

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE 6-10-96

WILLIAM R. RILEY,

Plaintiff,

vs.

Case No. 95-C-0093-H

RAYMOND B. KELLY; HALL, ESTILL,  
HARDWICK, GABLE, GOLDEN &  
NELSON, P.C.; and LARRY W.  
SANDEL,

Defendants.

**FILED**

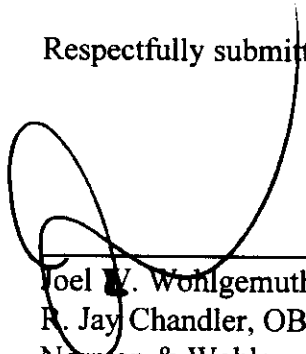
**JUN 7 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL**

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, William R. Riley, Raymond B. Kelly, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., and Larry W. Sandel, all of the parties to this lawsuit, hereby stipulate to the dismissal of this lawsuit and all claims made herein, with prejudice.

Respectfully submitted,

  
Joel W. Wohlgemuth, OBA No. 9811  
R. Jay Chandler, OBA No. 1603  
Norman & Wohlgemuth  
2900 Mid-Continent Tower  
Tulsa, OK 74103

Attorneys for Hall, Estill, Hardwick,  
Gable, Golden & Nelson, P.C., Raymond B.  
Kelly and Larry W. Sandel

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL S. HOLLOWAY; KAREN B.  
HOLLOWAY; CITY OF SAND  
SPRINGS, Oklahoma; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

ENTERED ON DOCKET  
DATE JUN 10 1996

**FILED**

JUN 7 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95cv 1094BU

**ORDER OF SALE**

UNITED STATES OF AMERICA TO: U.S. Marshal for the  
Northern District of Oklahoma

On May 22, 1996, the United States of America recovered a judgment In Rem  
against the Defendants, **Michael S. Hollaway and Karen B. Hollaway**, in the above-styled  
action to enforce a mortgage lien upon the following described property:

**THE SOUTH HALF (S/2) OF LOT FOUR (4), AND  
ALL OF LOT FIVE (5), BLOCK FORTY (40), OAK  
RIDGE SECOND ADDITION TO THE TOWN, NOW  
CITY OF SAND SPRINGS, COUNTY OF TULSA,  
STATE OF OKLAHOMA, ACCORDING TO THE  
RECORDED PLAT THEREOF.**

The amount of the judgment is the sum of \$71,478.49, plus interest at the rate  
of 11.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the  
current legal rate of 5.60 percent per annum until fully paid, plus the costs of this action  
accrued and accruing. The judgment further provides that the mortgage on the above-  
described property is foreclosed, and that all Defendants and all persons claiming under them

**FILED**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Plaintiff,

vs.

WILLIE SUMMERALL, JR.; RETA KAY SUMMERALL; UNKNOWN OCCUPANTS; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

**Defendants.**

Civil Case No. 95-CV 1000E

DATE 6-7-96

This matter comes on for consideration this 5 day of June.

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, WILLIE SUMMERALL, JR., RETA KAY SUMMERALL and UNKNOWN OCCUPANTSS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, WILLIE SUMMERALL, JR., signed a Waiver of Summons on October 9, 1995.

The Court further finds that the Defendants, RETA KAY SUMMERALL and UNKNOWN OCCUPANTS, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning March 29, 1996, and continuing through

May 3, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, RETA KAY SUMMERALL and UNKNOWN OCCUPANTS, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, RETA KAY SUMMERALL and UNKNOWN OCCUPANTS. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the part\* served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on October 12, 1995; and that the Defendants, WILLIE SUMMERALL, JR.,

RETA KAY SUMMERALL and UNKNOWN OCCUPANTS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Two (2), Block Ten (10), SUMMIT HEIGHTS  
ADDITION, to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on October 29, 1986, the Defendants, WILLIE SUMMERALL, JR., and RETA KAY SUMMERALL, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, their mortgage note in the amount of \$43,344.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, WILLIE SUMMERALL, JR., and RETA KAY SUMMERALL, husband and wife, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, a mortgage dated October 29, 1989, covering the above-described property. Said mortgage was recorded on November 10, 1986, in Book 4981, Page 1447, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 22, 1988, FIRST SECURITY MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to BANK OF OKLAHOMA, N.A. This Assignment of Mortgage was recorded on September 26, 1988, in Book 5130, Page 1266, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 28, 1988, Bank of Oklahoma, N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on September 30, 1988, in Book 5131, Page 1071, in the records of Tulsa County, Oklahoma. A Corrected Assignment was recorded on January 13, 1989, in Book 5161, Page 931, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 1, 1988, the Defendants, WILLIE SUMMERALL, JR., and RETA KAY SUMMERALL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on February 1, 1989, April 1, 1990, April 1, 1991 and September 1, 1991.

The Court further finds that the Defendants, WILLIE SUMMERALL, JR., and RETA KAY SUMMERALL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, WILLIE SUMMERALL, JR., and RETA KAY SUMMERALL, are indebted to the Plaintiff in the principal sum of \$75,349.04, plus interest at the rate of 8.5 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$14.00 which became a lien on the property

as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, WILLIE SUMMERALL, JR., RETA KAY SUMMERALL and UNKNOWN OCCUPANTS, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, WILLIE SUMMERALL, JR., and RETA KAY SUMMERALL, in the principal sum of \$75,349.04, plus interest at the rate of 8.5 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in

the amount of \$14.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, WILLIE SUMMERALL, JR., RETA KAY SUMMERALL, UNKNOWN OCCUPANTS and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendants, WILLIE SUMMERALL, JR., and RETA KAY SUMMERALL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$14.00,

personal property taxes which are currently due and  
owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await  
further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant  
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right  
to possession based upon any right of redemption) in the mortgagor or any other person  
subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and  
after the sale of the above-described real property, under and by virtue of this judgment and  
decree, all of the Defendants and all persons claiming under them since the filing of the  
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim  
in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
DICK A. BLAKELEY, OBA #852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4842

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure

Civil Action No. 95-CV 1000E

LFR:flv

**COPY**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**FILED**

**JUN 6 1996**

**LINDA WILLIS and J.B. REDUS,**

**Plaintiffs,**

**vs.**

**FORD MOTOR COMPANY,**

**Defendant.**

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**No. 95CV1106BU**

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

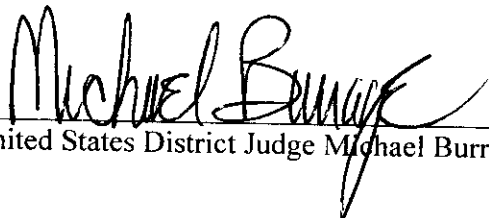
**ENTERED ON DOCKET**

**JUN - 7 1996.**  
**DATE** \_\_\_\_\_

**ORDER OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1)(ii), Fed. R. Civ. P, it is hereby

ORDERED that this action be, and it hereby is, dismissed with prejudice. All parties shall bear their own costs and attorneys' fees.

  
United States District Judge Michael Burrage

Dated: \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUN - 5 1996 *SAZ*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CONSOLIDATED GROUP LIMITED,  
and ENERGY CONSULTANTS, INC.

Plaintiff,

v.

ONYX INTERNATIONAL, INC.,  
DEPARTMENT OF NAVY, an agency of the  
United States of America, and  
THE SMALL BUSINESS ADMINISTRATION,  
an agency of the United States of America,

Defendant.

Case No. 95-C-603K ✓

ENTERED ON DOCKET

DATE 6-7-96

**JUDGMENT**

Upon the joint application of the Plaintiff Consolidated Group Limited and Defendant Onyx International, Inc. for entry of judgment, it is **ORDERED AND ADJUDGED** that the Plaintiff Consolidated Group Limited recover of the Defendant Onyx International, Inc. the sum of \$45,000.00. Each party shall bear its own costs, including attorney's fees, of this action.

  
SAM A. JOYNER  
United State Magistrate

ENTERED ON DOCKET  
DATE 6/7/96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DEBRA A. NEWMAN )  
Plaintiff, )  
v. )  
SHIRLEY S. CHATER, Commissioner, )  
Social Security Administration, )  
Defendant. )

NO. 95-C-866-M ✓

**FILED**

JUN 06 1996 *SK*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff has applied for an award of attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The Defendant, Commissioner of the Social Security Administration, has advised the Court she has no objection to an award of \$1,929.75 as requested by Plaintiff.

The Court finds that a fee enhancement for the cost-of-living is appropriate and the number of hours expended is reasonable. Accordingly, Plaintiff's motion for fees and costs pursuant to 28 U.S.C. § 2412(d) [Dkt. 12] is GRANTED in the amount of \$1,929.75.

SO ORDERED this 6<sup>th</sup> day of June, 1996.

*Frank H. McCarthy*  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

NOTE: THIS ORDER IS TO BE MAILED  
BY MAIL TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

ENTERED ON DOCKET  
DATE 6/7/96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

WILLIAM C. GEAR,  
SS# 445-54-2511

Plaintiff,

v.

SHIRLEY S. CHATER,<sup>1</sup> Commissioner  
Social Security Administration,

Defendant.

JUN 05 1996 *SLC*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

NO. 95-C-231-M ✓

**ORDER**

Plaintiff, William C. Gear, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits. In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U. S. C. §405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary.

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<sup>1</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

*Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and has properly outlined the required sequential analysis. The Court therefore incorporates this information into this order as the duplication of this effort would serve no useful purpose.

Mr. Gear's applications for disability benefits dated April 27, 1989 and for supplemental security income dated March 21, 1989 were denied August 2, 1989. The denials were affirmed on reconsideration. A hearing before an ALJ was held after which a denial decision was issued on October 25, 1990. On September 11, 1991 the Appeals Council remanded the case to the ALJ. A second hearing was held and a second denial decision was rendered on April 9, 1992. On November 12, 1992 the Appeals Council again remanded the case to the ALJ. A third hearing was held on March 23, 1993. The ALJ rendered a third denial decision on September 24, 1993 and entered the findings that are the subject of this appeal. The Appeals Council affirmed the September 24, 1993 findings of the ALJ on January 30, 1993.

The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Plaintiff claims he has been unable to work since March 15, 1984 due to ulcers, persistent diarrhea, lower back pain, abdominal pain due to residuals of a shot gun wound to the abdomen sustained at age 8, and the numerous corrective surgeries required as a result of the gunshot wound.

In the September 24, 1994 denial decision, the ALJ determined that Plaintiff is not able to return to his past relevant work at the heavy exertional level, but retains the residual functional capacity to perform the unskilled light and sedentary work outlined by the vocational expert. [R. 24]. Accordingly, the ALJ found Plaintiff was not "disabled" within the meaning of the Social Security Act on or before June 30, 1989<sup>2</sup>, or at any other time relevant to the decision.

Plaintiff alleges that the record does not support the determination of non-disability by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff argues the ALJ: (1) erroneously held that Plaintiff's impairments do not meet or equal listed impairments, 5.06 chronic ulcerative or granulomatous colitis and 5.07 regional enteritis; (2) failed to comply with the directions of the Appeals Council in its November 12, 1992 order of remand; and (3) erred in applying the grids and finding that Plaintiff can perform light work.

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<sup>2</sup> Date Plaintiff was last insured.

In their briefs before this Court both parties' identify specific listings and then argue their respective positions as to how the evidence either does, or does not, support the listing. In so doing the parties are essentially asking this Court to weigh the evidence and decide if the listings apply. It is not the Court's function to weigh the evidence and substitute its discretion for the Secretary/Commissioner. *Musgrave*, supra. However, the Court understands the parties predicament as the ALJ did not specify the listings he considered, nor the reasons the evidence he accepted did not meet the listings.

Concerning the listings, the ALJ found:

The claimant has severe residual abdominal gun shot wound, residual small bowel obstruction, chronic back and leg pain, right shoulder tendonitis, hand pain, borderline intellectual functioning and mental disorders; but does not have an impairment or combination of impairment [sic] of such severity as meets or equal [sic] any impairment listed in Appendix 1, Subpart P, Regulation No. 4.

[R. 25]. This conclusion is drawn without identification of the relevant listing, discussion of the specific medical evidence related thereto, or the rationale for the determination that Plaintiff's impairments do not meet or equal a listed impairment. In a recent opinion, *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996), the Tenth Circuit ruled that a "bare conclusion is beyond meaningful judicial review."

Under the Social Security Act,

[t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in

whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.

42 U.S.C. § 405(b)(1). Under this statute, the ALJ was required to discuss the evidence and explain why he found that appellant was not disabled under the listings.

The Court is prevented from weighing evidence in cases before the Social Security Administration, 42 U.S.C. §405(g). Therefore, when the ALJ's decision contains findings not accompanied by specific weighing of the evidence the Court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that Plaintiff's impairments do not meet or equal a listed impairment, or whether the correct legal standards were applied to arrive at that conclusion. *Id.* According to *Clifton*, this case must be remanded for the ALJ to set out his reasons for his determination that Plaintiff's impairments do not meet or equal a listed impairment.

Plaintiff claims that the case should be remanded for the additional reason that the ALJ failed to comply with the Appeals Council's directions. The Court finds that regardless of the requirements imposed by the Appeals Council, the ALJ failed to perform an evaluation of Plaintiff's credibility and subjective complaints of disabling pain as required by regulation<sup>3</sup> and case law.<sup>4</sup>

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<sup>3</sup> 20 C.F.R. §404.1529.

<sup>4</sup> *Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir. 1994); *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987)

Plaintiff claimed he was unable to work due to disabling pain. Since the Plaintiff's claim for benefits was denied, it is apparent that the ALJ determined that Plaintiff's complaints of pain were not wholly credible. Such a decision is entirely within the province of the ALJ as the Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). However, since the ALJ's decision contains no discussion of the ALJ's analysis, the Court has no basis upon which to determine whether the decision is supported by substantial evidence. Therefore, the case must be remanded for a proper pain and credibility evaluation. *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995).

Since the case is being remanded, the Court will briefly address other issues raised by Plaintiff. Plaintiff has asserted that the ALJ's application of the medical-vocational guidelines ("grids") found at 20 C.F.R. Pt. 404, Subpt. P, App. 2 was improper. If the ALJ had conclusively relied on the grids as the basis for finding Plaintiff not disabled, then Plaintiff would be correct. However, the ALJ's decision is unequivocal that he did not rely solely upon the grids. Having found that Plaintiff had non-exertional impairments which narrow the range of possible work he can perform, the ALJ properly called a vocational expert to testify whether specific jobs appropriate to Plaintiff's limitations exist in the national economy. *Channel v. Heckler*, 747 F.2d 577, 581 (10th Cir. 1984).

Citing *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987), Plaintiff argues that in order to find that he is capable of doing light work, "it must be established that he can perform the entire range of activities, both exertional and non-exertional, required of light work on a daily basis." [Dkt. 7, p.4]. A similar argument was rejected in *Evans v. Chater*, 55 F.3d 530, 532 (10th Cir. 1995). There, based on language found in *Campbell v. Bowen*, 822 F.2d 1518 (10th Cir. 1987), Plaintiff argued that to deny benefits at step five the Secretary must show that the claimant can perform a substantial majority of the occupations in her RFC. Calling this a "meritless argument," the Court explained that the prerequisites for conclusive reliance on the grids are not applicable in cases decided upon the testimony of a vocational expert ("non-grid cases"). In other words, grid application requirements do not apply to non-grid cases.

Plaintiff's reliance on *Frey* presents the same general problem that concerned the Court in *Evans*: the attempt to impose grid application requirements to non-grid cases. *Frey* is a grid case. The instant case was not decided on the grids. The language Plaintiff quoted from *Frey* pertains only to the proper application of the grids and therefore is not applicable to the present case not decided on the grids.

The Court finds no merit to Plaintiff's argument that the ALJ's questioning of the vocational expert and use of this testimony was improper. The ALJ's questions to the vocational expert properly addressed those physical and mental impairments which he found were supported by substantial evidence. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

The Court REMANDS this case to the Commissioner:

- (1) to supply a full analysis of his conclusion that Plaintiff's impairments fail to meet or equal any listed impairments; and
- (2) to make express findings concerning Plaintiff's claims of disabling pain in accordance with *Luna* and 20 C.F.R. §404.1529 ;

and for any further proceedings the ALJ finds necessary as a result of the analysis and findings. In remanding this case the Court does not dictate the result, nor does it suggest that the record is insufficient. Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler*, 68 F.3d at 391.

SO ORDERED this 5<sup>th</sup> day of June, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

PRODUCERS OIL COMPANY and )  
CHARLES GOODALL REVOCABLE TRUST, )

Plaintiffs, )

vs. )

MARION Z. THOMPSON, PAMELA )  
DENISE THOMPSON, JACK JUNIOR )  
THOMPSON, PAMELA SUE THOMPSON, )  
EMRAL GUINN, GEORGE HUGHES, )  
NANCY HUGHES, and SUN REFINING )  
MARKETING COMPANY, )

Defendants. )

JUN 5 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-1178-E

ENTERED ON DOCKET

**JUN - 6 1996** ✓

DATE \_\_\_\_\_

**ORDER FOR DISMISSAL WITH PREJUDICE OF DEFENDANT EMRAL GUINN**

UPON THE MOTION of the Plaintiffs, PRODUCERS OIL COMPANY and the  
CHARLES GOODALL REVOCABLE TRUST, good cause appearing, it is ordered that  
THIS CASE IS DISMISSED WITH PREJUDICE as against Defendant EMRAL GUINN  
("Mr. Guinn"), with each party to bear its own costs.

Dated: June 4, 1996.

**S/ JAMES O. ELLISON**

Hon. James O. Ellison  
U.S. District Judge

Submitted by:



G. Steven Stidham, OBA #8633

Brian S. Gaskill, OBA #3278

of

SNEED, LANG, ADAMS & BARNETT

Two West Second Street, Suite 2300

Tulsa, Oklahoma 74103-3136

(918) 583-3145

Attorneys for Plaintiffs

PRODUCERS OIL COMPANY

and the CHARLES GOODALL REVOCABLE TRUST

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 06 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARK ZUMWALT, as next friend of  
TZ, a minor, and  
STEVE NICHOLSON, as next friend of  
KN, a minor,

Plaintiffs,

vs.

No. 96-C-108-K

PARK NEWSPAPERS OF SAPULPA, INC.,  
an Oklahoma corporation; CITY OF SAPULPA,  
an Municipal Corporation; SAPULPA PUBLIC  
SCHOOLS, Independent School District #33;  
ART COX; and CHARLES LAKE,

Defendants.

ENTERED ON DOCKET

DATE JUN 05 1996

**O R D E R**

Now before this Court is the motion of Defendants Art Cox, Charles Lake and Park Newspapers of Sapulpa, Inc. (collectively "Media Defendants") for dismissal for failure to state a claim, or, alternatively, for summary judgment.

**I. Facts.**

Mark Zumwalt and Steve Nicholson bring the instant action as next friends for their sons Thomas Fenton Zumwalt and Kyle Stephen Nicholson, respectively ("Plaintiffs"), against the Media Defendants as well as Sapulpa Public Schools and the City of Sapulpa. The instant litigation arises out of a series of three articles published in the *Sapulpa Daily Herald* ("Herald") regarding the alleged arrest and suspension of Thomas Zumwalt and

Kyle Nicholson after Sapulpa City police found an incendiary device in a locker in Sapulpa Junior High School on January 21, 1994. On January 22, a reporter from the *Herald* went to the Sapulpa Police Station and obtained copies of the Sapulpa Police reports concerning the incident. The Sapulpa Police gave the media access to a room in the police station where police reports were available for viewing and copying. The police reports concerning the juvenile Defendants were marked "DO NOT PRINT" by the Sapulpa Police Department, as were all reports concerning juveniles. On January 27, 1994, Superintendent of Sapulpa Schools Charles B. Dodson sent the *Herald* the following fax:

Students involved in the incendiary device incident at the Sapulpa Junior High School are no longer attending classes and are not on campus in the Sapulpa Public Schools. The fact of discipline and amount of discipline are protected under state and federal law and cannot be released.

(Def. ex. R43.) The *Herald* published three articles on the arrest of Nicholson and Zumwalt and their suspension from Sapulpa Junior High School, mentioning them by name. These articles were based in part on the police reports obtained by the *Herald* as well as the faxed communication from Superintendent Dodson.

Plaintiffs originally filed the instant action in state court. Plaintiffs had previously filed two separate actions in state court alleging various state law causes of action. The instant action, which alleges violations of federal civil rights laws, was removed to this Court. Plaintiffs' Petition states

that the action arises under 42 U.S.C. §§ 1983, 1985, 1986 and 1988 as well as the 5th and 14th Amendments to the Constitution. (Petition ¶ 3.) The cause of action, entitled "Infringement of Liberty Interest without Due Process," asserts that the newspaper articles were "false and defamatory and stigmatized plaintiffs." (Pet. ¶ 5.) The Petition states,

Defendants, in concert each with the other, stigmatized Plaintiffs by providing and or publishing untrue or privileged information regarding the "arrest" of plaintiff [sic] and their subsequent suspension without due process of law. The stigmatization of Plaintiffs by Defendants caused injury to their reputation and severe emotional distress and harm. The stigmatization was done in violation of Plaintiffs' constitutional right to due process before infringement of their liberty interest and is especially offensive in this case because specific procedures to provide due process were mandated by state statute, 10 O.S. 1125 et seq. and no attempt was made to comply.

(Petition ¶ 7.)

Media Defendants argue that Plaintiffs have not plead sufficient facts to establish that Media Defendants acted under color of law; therefore, the petition does not state a civil rights claim against them. Media Defendants argue further that even if Plaintiffs have alleged sufficient facts to state a claim, Media Defendants' reporting of the events were true and accurate and therefore not actionable.

## **II. Standard for Dismissal and Summary Judgment.**

In deciding whether to dismiss Plaintiffs' Complaint for failure to state a claim, Rule 12b(6), Fed.R.Civ.P., this Court must accept as true the Plaintiffs' well-pleaded factual

allegations, and all reasonable inferences must be indulged in favor of Plaintiffs. The Complaint should be dismissed only if it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1266 (10th Cir. 1989).

The standard for summary judgment is less demanding. As the Supreme Court stated in Celotex Corp. v. Catrett, 477 U.S. 317 (1986),

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322. Where no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323.

### III. Discussion.

This Court now takes up Plaintiffs' §1983 action against the Media Defendants.<sup>1</sup> Plaintiffs' claim closely resembles that in

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<sup>1</sup> Although Plaintiffs apparently assert claims under 42 U.S.C. §§ 1983, 1985, 1986 and 1988, only the § 1983 claim is relevant to the instant determination. Of the various subsections of § 1985, only § 1985(3) would appear remotely applicable to the instant action; however, the Supreme Court has required as an element of § 1985(3) invidious discriminatory motivation, Griffin v. Breckenridge, 403 U.S. 88, 100 (1971), which is not alleged in the instant action. Since liability under § 1986 is contingent upon a violation of § 1985, § 1986 is unavailable as well. The

Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (10th Cir. 1989).

Curiously, neither party cites this controlling authority. The Tenth Circuit explained,

Section 1983 applies only to actions performed under color of state law. That requirement does not mean that all defendants must be officers of the state. If a private defendant is "a willful participant in joint action with the State or its agents," that is sufficient. Dennis v. Sparks, 449 U.S. 24, 27 (1980); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); Lee v. Town of Estes Park, 820 F.2d 1112, 1114 (10th Cir.1987).

Phelps, 886 F.2d at 1270.<sup>2</sup>

As in the instant action, plaintiffs in Phelps alleged that state officials had engaged in an arrangement with a newspaper whereby the officials improperly divulged confidential materials to the newspaper. Plaintiff asserted that he was injured when the newspaper published articles based on those materials. The court acknowledged that what constitutes state action under the Fourteenth Amendment<sup>3</sup> has not been defined with precision. Nevertheless, the court held, the Supreme Court has instructed that state action requires "significant" involvement

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award of attorneys' fees pursuant to § 1988 is not at issue in the instant motion.

<sup>2</sup> The Tenth Circuit points out that state action could also be shown in certain limited situations if the offensive conduct involved a "public function," see Marsh v. Alabama, 326 U.S. 501, 506 (1946). However, the publication of the newspaper articles of which Plaintiffs complain were private acts, not acts involving a public function. Phelps, 886 F.2d at 1271 n.9.

<sup>3</sup> In Phelps, the Tenth Circuit indicated that the standard for finding state action pursuant to Fourteenth Amendment jurisprudence is equivalent to a finding of under-color-of-state-law pursuant to § 1983. See Phelps, 886 F.2d at 1271 n.7 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982)).

by the state in the allegedly unconstitutional conduct. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). This requirement, explained the Tenth Circuit,

necessitates a showing here that the state did more than merely make available to the newspaper defendants [the objectionable information]. Plaintiff must show that the state played a significant role in the [allegedly unconstitutional conduct]. In other words, plaintiff must demonstrate that there was a significant nexus between the actions of the state and the allegedly [unconstitutional conduct].

Phelps, 866 F.2d at 1271. The court also stated that in making a state action determination, a court must consider whether state defendants acted "in concert with" media defendants. Id. at 1272.<sup>4</sup>

Plaintiffs' factual allegations in the instant case do not support a finding of significant involvement by the state in the alleged unconstitutional conduct. At most, the Sapulpa Police Department "merely made available" to the *Herald* the details of the incident and identity of the juvenile Plaintiffs. Moreover, the police marked the reports concerning the juvenile Plaintiffs "DO NOT PRINT." Therefore, the nexus between the actions of the police and the publication of the juvenile Plaintiffs' names in the *Herald* was attenuated at best, and there is no evidence of

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<sup>4</sup> The Seventh Circuit's analysis of liability under the joint action theory is also instructive. The court held that a private defendant may be said to be acting under color of state law if that defendant collaborates with a state official in denying the plaintiff his constitutional rights. It is necessary to this charge that the "public and private actors share a common and unconstitutional goal." In other words, there must be some concerted effort between public and private actors. Starnes v. Capital Cities Media, Inc., 39 F.3d 1394, 1397 (7th Cir. 1994).

the police acting "in concert with" media defendants to deprive Plaintiffs of their constitutional rights.<sup>5</sup> Similarly, the communication from Superintendent Charles Dodson to the *Herald* did not rise to the level of significant involvement. The fax merely made available to the *Herald* the fact of the students' suspension. There is no evidence that by this communication the school superintendent was acting "in concert with" media defendants to deprive Plaintiffs of their constitutional rights.

In Phelps, the Tenth Circuit also warned of the possible chilling effect of finding state action in the exercise of protected expression. The court observed,

[T]he act of publication and the exercise of editorial discretion concerning what to publish are protected by the First Amendment. If the mere publication of an article based upon information obtained from government officials could constitute state action, private newspapers would be significantly discouraged from interviewing state officials to gather information on important public issues. The Supreme Court has repeatedly emphasized the First Amendment's concern with minimizing that type of chilling effect. See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777-78 (1986); New York Times v. Sullivan, 376 U.S. 354, 272 (1964).

Phelps, 886 F.2d at 1271. This admonition applies with equal force to the instant action. If the publication of articles based on police reports and communications with municipal officials could automatically subject the media to § 1983

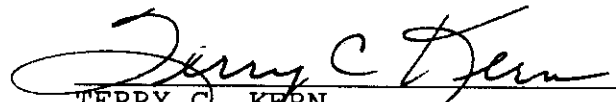
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<sup>5</sup> This Court assumes, for purposes of this determination, that if state action were present, the publication of the articles would have constituted a violation of Plaintiffs' constitutional rights. This element of Plaintiffs' case remains to be proved.

liability, media reporting of issues of public concern would be severely chilled.

For the reasons stated above, this Court holds that Plaintiffs have failed to make a showing sufficient to establish the existence of an element essential to their case, and on which they would bear the burden of proof at trial--i.e., state action. Since Plaintiffs have failed to make such a showing, Media Defendants are entitled to a judgment as a matter of law. Media Defendants' motion for summary judgment is therefore GRANTED.<sup>6</sup>

IT IS SO ORDERED THIS 31 DAY OF MAY, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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<sup>6</sup> Media Defendants' motion for dismissal is therefore moot.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN - 5 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

In the Matter of PJJ, a  
Juvenile under 18 years of age,  
Andy McNorton,  
Petitioner,

vs.

The Seneca-Cayuga Tribe of  
Oklahoma and The Honorable  
Lynn Burris, Judge of The  
Court of Indian Offenses in  
and for Miami, Oklahoma,  
Respondents.

Case No. 96-CV-181-B

ENTERED ON DOCKET  
DATE JUN 05 1996

ORDER

The Court has for consideration United States of America on behalf of Respondent Lynn Burris' ("USA") Request for Emergency Consideration of Stay of Writ of Habeas Corpus filed June 4, 1996. After a careful review of the record, the Court is of the opinion USA's Request for Emergency Consideration of Writ of Habeas Corpus should be DENIED.

The Court hereby amends the Order granting Petitioner's Writ of Habeas Corpus, filed May 31, 1996, as follows:

1. On page 3, the first sentence of the ANALYSIS section is amended to read, "This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 25 U.S.C. § 1303 and 28 U.S.C. § 2241(a)."

The Court FINDS the parties have been afforded notice and an opportunity to be heard, both orally and via the voluminous documents filed with the Court. Any intimation of a due process violation by USA is without merit. (USA's Request for Emergency Consideration of Stay of Writ of

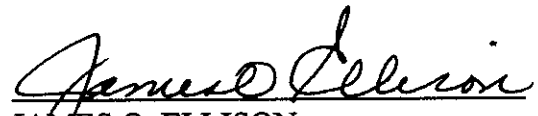
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Habeas Corpus, ¶(5).

USA's Request for Emergency Consideration of Stay of Writ of Habeas Corpus is hereby DENIED.

Pursuant to Local Rule 54.1, costs associated with Petitioner's Writ of Habeas Corpus are hereby awarded to Petitioner and against Respondent Lynn Burris, Judge of the Court of Indian Offenses in and for Miami, Oklahoma, in the amount of \$15.20. Pursuant to Local Rule 54.1, costs associated with Petitioner's Writ of Habeas Corpus are hereby awarded to Petitioner and against Respondent Seneca-Cayuga Tribe of Oklahoma in the amount of \$107.00.

IT IS SO ORDERED THIS 5<sup>th</sup> DAY OF JUNE, 1996.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE  
*for: Thomas R. Brett*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

JEFFREY HARPER,

Plaintiff,

vs.

WESTERN SUMMIT CONSTRUCTORS,  
INC.,

Defendant.

no. 96-C-200-K

**FILED**

JUN 06 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Now on this 31 day of May, 1996, this matter comes on pursuant to the Joint Stipulation of Dismissal with Prejudice. For good cause shown, and there being no objection to said Dismissal, the Court finds that said Dismissal should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled cause be and is hereby dismissed with prejudice.

s/ TERRY C. KERN  
JUDGE OF THE DISTRICT COURT

## 117237.1

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

DAVID DEMUTH, THE DEMUTH CORPORATION,  
KEITH STUMPF and CREMATION SOCIETY OF  
OKLAHOMA, INC.,

Plaintiffs,

v.

JACK T. L. SLOAN and TULSA CREMATION  
SOCIETY, INC.,

Defendants.

FILED

JUN 4 - 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 95-C-1155-B

ENTERED ON DOCKET

DATE JUN - 5 1996

STIPULATION FOR DISMISSAL

The parties hereby stipulate, in accordance with Rule 41, Fed. R. Civ. P., that the captioned matter may be dismissed, with each party bearing its/his own costs and attorney fees.

FULLER, TUBB & POMEROY

By

*Terry Stokes*

Terry Stokes, OBA #11177

800 Bank of Oklahoma Plaza  
201 Robert S. Kerr Avenue  
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(405) 235-2575

ATTORNEYS FOR PLAINTIFF

*CL PS*

Charles Peters Seger, OBA #8052

403 S. Cheyenne, Suite 1100  
Tulsa, OK 74103  
(918) 582-9339

ATTORNEY FOR DEFENDANTS

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUNE 4 - 1996  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ZELDA GOSSETT,  
  
Plaintiff,  
  
v.  
  
HARSCO CORPORATION,  
  
Defendant.

95-C-793-C ✓

ENTERED ON DOCKET

DATE JUN 5 1996

ORDER OF DISMISSAL

Now on this 7 day of June, 1996, this matter comes on pursuant to the Stipulation of Dismissal with Prejudice of this case to Federal Court pursuant to 28 U.S.C., §§ 1441 and 1446. For good cause shown, and there being no objection to said Dismissal, the Court finds that said Dismissal should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled cause be and is hereby dismissed with prejudice to its refiling.

  
JUDGE OF THE DISTRICT COURT

DATE 6-5-96

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**F I L E D**

**TEREX CORPORATION,**  
**a Delaware corporation,**

**Plaintiff,**

**v.**

**SANDAHL EXPORTS CORPORATION,**  
**a California corporation, f/k/a**  
**HYPAC, INC. and HYDRAULIC PARTS**  
**AND COMPONENTS, INC., a California**  
**corporation, STEVEN A. SANDAHL, ALAN**  
**W. SANDAHL and CARLA J. SANDAHL,**

**Defendants.**

**JUN 4 1996**

**Phil Lombardi, Clerk**  
**U.S. DISTRICT COURT**

**Case No. 95-C-288 H**

**STIPULATION OF DISMISSAL**

The Plaintiff Terex Corporation ("Terex"), the Defendants Steven A. Sandahl, Carla J. Sandahl, and Alan W. Sandahl and the Third-party Defendants/Additional Counterclaim Defendants Robert A. Giebel, Jr., Joel Stutts and Howard Jaffe, pursuant to Fed. R. Civ. P. 41(a) and that certain Settlement Agreement executed by the parties, hereby dismiss all claims pending in the captioned matter with prejudice.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.

By: 

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AND ROBERT A. GIEBEL, JR.

MAHAFFEY & GORE

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ATTORNEYS FOR SANDAHL EXPORTS  
CORPORATION, STEVEN A. SANDAHL,  
ALAN W. SANDAHL and CARLA J.  
SANDAHL

NORMAN & WOHLGEMUTH

By: 

John Dowdell  
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Tulsa, Oklahoma 74103

ATTORNEYS FOR JOEL STUTTS AND  
HOWARD JAFFE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 3 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MILDRED PUGH,

Plaintiff,

vs.

No. 95-C-398-E ✓

HOLLYWOOD COMMUNITY HOSPITAL OF  
VAN NUYS; FRED GROSS; THE FRED  
GROSS CLINICS; NEW LIFE TREATMENT  
CENTERS, INC; PARACLETE PSYCHIATRIC  
SERVICES; PARACLETE MANAGEMENT  
SERVICES, INC.; PARACELSUS HEALTH  
CARE CORPORATION;  
BUENA PARK COMMUNITY HOSPITAL;  
PARACELSUS HEALTHCARE CORPORATION;  
NEW START TREATMENT CENTERS, INC.;  
LEE-ADA, INC.; FREDERICK L. GROSS  
and STEPHEN F. ARTERBURN,

Defendants.

ENTERED ON DOCKET

DATE 6-5-96

**ORDER**

Before the Court are the following motions filed by the defendants: (1) Motions to Dismiss (Plaintiff's Second Amended Complaint) filed by defendants Stephen F. Arterburn ("Arterburn") and Paracelsus Healthcare Corporation ("Paracelsus") in the Tulsa County District Court before removal of this action<sup>1</sup>; (2) Motion to Dismiss (Plaintiff's Second Amended Complaint) filed by defendants Lee-Ada, Inc. ("Lee-Ada") and Frederick L. Gross a/k/a Fred Gross ("Gross") (Docket No. 3); and (3) Supplemental Motion to Dismiss (Third Amended Complaint) or in the Alternative to Transfer

<sup>1</sup> The Court notes that defendants failed to attach these motions as part of the record upon removal. Rather, defendants attached the motions as Exhibits A and B to their Reply to Response of Plaintiff to Defendants' Supplemental Motion to Dismiss or in the Alternative to Transfer Venue (Docket No. 35).

Venue filed by defendants Arterburn, Gross, Lee-Ada, Paracelsus and New Life Treatment Centers, Inc. ("New Life") (Docket No. 32). Also before the Court are the Application for Scheduling Conference and to Lift Stay on Discovery (Docket No. 38) and for Order Scheduling Case Management Conference (Docket No. 40) filed by the plaintiff, Mildred M. Pugh ("Pugh").

On May 1, 1995, this case was removed from the District Court of Tulsa County where Pugh filed her Original Petition on August 23, 1994,<sup>2</sup> her Amended Petition on February 8, 1995<sup>3</sup> and her Second Amended Petition on March 9, 1995.<sup>4</sup> Prior to the removal, two motions to dismiss plaintiff's Second Amended Complaint on behalf of defendants Arterburn and Paracelsus were pending. After removal, defendants Gross and Lee-Ada jointly moved to dismiss plaintiff's Second Amended Complaint. The basis for these motions was lack of personal jurisdiction.<sup>5</sup> Pugh responded to the motions in part arguing that her civil claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against defendants renders any determination of defendants' minimum contacts with Oklahoma unnecessary as RICO's nationwide service of process mandates only that defendants have minimum contacts with the United States to establish this Court's personal jurisdiction over defendants.

To evaluate Pugh's RICO claim, the Court ordered Pugh to submit a RICO case statement detailing the factual and legal bases of her claim. Plaintiff filed her RICO Statement on July 20, 1995 and a Third Amended Complaint on August 21, 1995, alleging defendants' violation of 18 U.S.C.

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<sup>2</sup> In her original Petition, Pugh alleged fraud, defamation and intentional infliction of emotional distress.

<sup>3</sup> In her Amended Petition, Pugh added claims of violations of RICO, 18 U.S.C. §1962(b),(c) and (d) and the Oklahoma Consumer Protection Act, 15 O.S. §753(5) and (20).

<sup>4</sup> Pugh filed Plaintiff's Second Amended Petition to substitute Paracelsus Healthcare Corporation for the party wrongly designated in the prior two petitions as Paracelsus Healthcare Corporation.

<sup>5</sup> In addition, Paracelsus and Arterburn moved to dismiss for failure to serve within 180 days of the filing of the Original Petition pursuant to 12 O.S. §2004(I).

§1962(c) and (d).<sup>6</sup> Defendants Arterburn, Gross, Lee-Ada, New Life<sup>7</sup> and Paracelsus then jointly supplemented their motions to dismiss (1) incorporating the defense of lack of personal jurisdiction, Fed.R.Civ.P. 12(b)(2); (2) adding defenses of failure to state claims under RICO, Oklahoma, Texas and California law, and improper venue, Fed.R.Civ.P. 12(b)(6) and (3); and, (3) in the alternative, moving to transfer venue pursuant to 28 U.S.C. §1404(a). *Supplemental Motion to Dismiss or in the Alternative to Transfer Venue (Docket No. 32)*.

The Court does not reach defendants' Rule 12(b)(6) motions except as to Plaintiff's RICO claim because the Court finds that (1) Pugh has stated a claim under 18 U.S.C. §1962(c) and (d); (2) venue is improper for that claim; (3) Pugh's state law claims arise out of the same operative facts as the RICO claim, and thus proper venue for the RICO claim will support adjudication of all Pugh's claims; and (4) venue is proper in and this case should be transferred to the district court in the Central District of California. As the case will be transferred to the Central District of California, the merits of defendants' 12(b)(6) motion to dismiss the remaining state law claims are more properly addressed by that court. The Court thus confines its 12(b)(6) discussion to Pugh's allegations that Defendants violated 18 U.S.C. §1962(c) and (d).

#### **A. RICO CLAIM**

In support of her RICO claim, Pugh makes the following allegations. Defendants conspired to violate and did violate the RICO statutes by actively and knowingly participating in an enterprise

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<sup>6</sup> Pugh dropped her claim for violation of 18 U.S.C. §1962(b) and added the following claims for relief against Defendants in the Third Amended Complaint: (1) violation of the Texas Treatment Facility's Marketing Practices Act and the Texas Deceptive Trade Practices Act, and (2) violations of California Health and Safety Code, California Business and Professions Code and Negligence Per Se under the California Evidence Code.

<sup>7</sup> There is no record of New Life filing a motion to dismiss prior to its joining in the Supplemental Motion to Dismiss filed by defendants Arterburn, Gross, Lee-Ada and Paracelsus.

which engaged in racketeering activity to collect medical insurance benefits through “a massive patient bounty hunting and insurance fraud scheme.” Specifically, defendant New Life, a California corporation with its principal place of business in California, engaged in mass-marketing and promoting “Christian Therapy,” psychiatric/psychological therapy which employed a spiritual, Christian approach to treatment for depression and other psychological conditions.<sup>8</sup> Hollywood Community Hospital of Van Nuys and Buena Park Community Hospital ( the “associated hospitals”), California corporations with their principal place of business in California, contracted with New Life to draw participants to their facilities by compensating New Life in part based on the number of admissions who participated in the New Life Christian Therapy Program (“Program”). The associated hospitals are owned and operated by defendant Paracelsus.

New Life solicited patients for the associated hospitals through advertisements and telemarketing. New Life advertised nationwide by television, Christian radio, brochures, and educational seminars. New Life was the “brainchild” of Arterburn, a licensed minister who is an active speaker at Christian seminars, has appeared on television talk shows and authored several books which promote spiritual health and recovery. The ads and Arterburn’s books listed an “800” number to call for information. New Life employed telemarketers who were not qualified mental health professionals as the “crisis response team” to answer the “800” number callers. The telemarketers encouraged callers to talk about their problems and their relationship with Christ, and pressured them to enroll in the Program. Prospective participants were asked about their medical insurance coverage and encouraged and assisted in changing insurance policies to ensure coverage

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<sup>8</sup> The only allegation pertaining to defendant New Start Treatment Centers, Inc. is that it is a division, subsidiary or affiliated corporation of New Life.

for services provided by the Program. The telemarketers also informed callers that New Life would make arrangements and pay for all transportation to the associated hospitals.

Based on the phone solicitation, participants were recommended for admission to one of the associated hospitals based on diagnoses of Major Depression or Depressive Psychosis. The associated hospitals were not equipped to admit and treat serious psychiatric illness, and the diagnoses and admissions were routinely made without any examination by a mental health professional. Staff members from Paracelsus, New Life and the associated hospitals met routinely to review various insurers' claim criteria and to instruct doctors and nurses how to "double chart" New Life patients, make compensable entries and prolong the patients' hospitalization. The associated hospitals thus billed for services which were not determined to be medically necessary and/or services never provided. Defendants Paraclete Psychiatric Services, Inc. and Paraclete Management Services, Inc., wholly-owned subsidiaries or divisions of New Life, billed patients and their insurance carriers for services of the physicians and therapists involved in the Program although the services were not provided, not necessary and not warranted.

The only allegations pertaining to Frederick L. Gross a/k/a Fred Gross, The Fred Gross Clinics and Lee-Ada, Inc. are that (1) they are the originator and licensor of the Fred Gross Christian Therapy Program purchased by New Life and renamed the New Life Christian Therapy Program; and (2) Fred Gross promoted the Program for New Life.

Pugh alleges that she was injured by defendants' racketeering activity when she responded to a New Life ad while a resident of Houston, Texas. During her discussion with one of New Life's telemarketers, Pugh was informed that the Program leased rooms from a local hospital and the staff were Christians who could help her become a better Christian. She was also informed that her

insurance coverage was inadequate and that she needed to change insurance companies. As a result, Pugh changed her insurance coverage to Metropolitan Life ("MetLife") which required a higher premium.<sup>9</sup> New Life pre-paid Pugh's airline tickets to California and upon her arrival in California, transported her to the Buena Park Community Hospital. When Pugh refused to be admitted to this "poorly maintained psychiatric hospital" and demanded to be returned to the airport, she was persuaded to look at the Hollywood Community Hospital of Van Nuys (the "Van Nuys hospital") where she was pressured to stay for one night. She insisted on leaving and did leave the next morning. Unknown to her, Pugh had been formally admitted to the Van Nuys hospital under a diagnosis of "major depression." Although no test, exam or evaluation of Pugh was conducted, New Life and the Van Nuys hospital submitted charges to MetLife for lab tests, urinalysis, recreational therapy analysis, nutritional assessment, occupational therapy, educational therapy, group therapy, individual therapy, admission intake and aftercare planning based on a diagnosis of "depressive psychosis." MetLife paid the claim. When Pugh complained about the diagnosis and incorrect billing, the deductible was waived because of "financial hardship." However, due to her history of psychiatric treatment - New Life/Van Nuys hospital's false claims for treatment of a phoney psychiatric diagnosis - Pugh has attempted and failed to secure less expensive medical insurance.

Considering defendants' Rule 12(b)(6) motion to dismiss the RICO claim in a light most favorable to Pugh and taking as true all of Pugh's allegations in the Third Amended Complaint and RICO Statement, the Court denies defendants' motion to dismiss Pugh's RICO claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1148 (10th

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<sup>9</sup> Defendants claim that Pugh actually applied for insurance with MetLife before she contacted defendants. However, this matter is before the Court on a motion to dismiss and Pugh's allegations must be taken as true.

Cir. 1989). Specifically, the Court finds that Pugh has sufficiently alleged direct injury to her property as required by 18 U.S.C. §1964(c) by claiming that she sought and was denied less expensive medical insurance from MetLife due to her record of psychiatric treatment resulting from defendants' fraudulent acts. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992).

## **B. PERSONAL JURISDICTION**

Defendants also move to dismiss for lack of personal jurisdiction. None of the defendants is a resident of Oklahoma: all of the corporate defendants are California corporations with their principal place of business in California, and the individual defendants, Arterburn and Gross, are residents of California. This Court has personal jurisdiction over non-resident defendants only if they are amenable to process and the exercise of personal jurisdiction comports with due process. *Omni Capital Intern. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987). "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Id.* quoting *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 444-45 (1946).

Pugh argues that this Court has personal jurisdiction over the nonresident defendants because they are amenable to service under RICO's nationwide service of process statute. Specifically, 18 U.S.C. §1965(d) authorizes the Court to exercise personal jurisdiction over defendants regardless of whether they have minimum contacts with Oklahoma, because they have minimum contacts with the United States, citing *Soltex Polymer Corp. v. Fortex Industries, Inc.*, 590 F.Supp. 1453, 1458 (E.D.N.Y. 1984); *Omni Video Games, Inc. v. Wing Co., Ltd.*, 754 F.Supp. 261, 263 (D.R.I. 1991); *Monarch Normandy Square Partners v. Normandy Square*

*Assoc., L.P.*, 817 F.Supp. 899, 902-03 (D. Kan. 1993); *American Trade Partners, L.P. v. A-1 Intern. Importing Enterprises, Ltd.*, 755 F.Supp. 1292, 1302 (E.D.Pa. 1991); *Dooley v. United Technologies Corp.*, 786 F.Supp. 65, 70-71 (D.D.C. 1992); *University Sav. Ass'n. v. Bank of New Haven*, 765 F.Supp. 35, 37 (D.Conn. 1991); and *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F.Supp. 1040, 1055-56 (S.D.N.Y. 1987).

The RICO venue and process statutes are found under 18 U.S.C. §1965(a)-(d) and state in pertinent part the following:

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transact his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

The cases interpreting these provisions present remarkably diverse analyses. While the cases uniformly agree that RICO provides for nationwide service of process, they differ as to which section authorizes such, and the extent of a district court's in personam jurisdiction resulting from this authorization.

The cases cited by Pugh above identify §1965(d) as RICO's nationwide service of process statute and conclude that this statutory authorization of nationwide service necessarily extends the district court's jurisdiction to the boundaries of United States, thus requiring only that the defendants have minimum contacts with the United States for the court to exercise jurisdiction over them. According to this "national contacts" view, the Court would not have to engage in an

analysis of each defendant's minimum contacts with Oklahoma to comport with due process requirements. Rather, to exercise personal jurisdiction over nonresident defendants, the Court need only rely on the nationwide service of process provision which confers jurisdiction over any defendant who is amenable to service. Section 1965(d) authorizes service anywhere in the United States; therefore, the Court has jurisdiction over those reached by this service.

This view purports no conflict with *International Shoe* and its progeny. As one court reasons, the constitutional rationale for the *International Shoe* doctrine

arises out of the limitations inherent in concepts of sovereignty. In enacting and enforcing laws, each state exercises a sovereign function. This sovereignty may be exercised only over those who reside in the state and those who undertake activities within it. By determining when "a state may make binding a judgment in personam against an individual or corporate defendant," the doctrine establishes when a defendant may be fairly thought to have submitted itself to that limited sovereignty.

Properly understood as defining the limits on the exercise of the sovereign function, the doctrine's application to federal jurisdiction is unambiguous. Subject only to the regulation of Congress, each federal court exercises the "judicial Power of the United States," not a judicial power constitutionally limited by the boundaries of a particular district. . . . Because the district court's jurisdiction is always potentially, and, in this case, actually co-extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States, "the sovereign that has created the court . . ."

*FTC v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. 1981)(applying the "national contacts" test to Section 9 of the Federal Trade Commission Act)(footnotes and citations omitted).

Disagreeing with this rationale, the district court in *Wichita Federal Sav. and Loan Ass'n. v. Landmark Group, Inc.*, 674 F.Supp. 321 (D.Kan. 1987) rejected the "national contacts" test and concluded that a defendant served pursuant to RICO's nationwide service of process statute "must have 'minimum contacts' in the forum district itself" for the court to exercise

jurisdiction over him/her. *Id.* at 325. In so finding, the court relied on *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982) wherein the United States Supreme Court noted that “[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest,” rather than a territorial limitation on sovereignty. The *Wichita Federal* court held

[The] line of cases construing and applying *Insurance Corp. of Ireland* makes it clear that the issue of personal jurisdiction over a nonresident defendant (corporate or otherwise), which is properly served under the nationwide service of process statutes, entails a Fifth Amendment due process “minimum contacts” analysis, with consideration given to the following factors: (1) the burden imposed upon defendant by litigation in the forum state; (2) defendant’s reasonable expectation and the foreseeability of litigation in the forum state; (3) plaintiff’s interest in convenient and effective relief; (4) the federal judicial system’s interest in efficiently resolving controversies; and (5) the forum state’s interest in having a court, within the forum state, adjudicate the dispute.

*Id.* at 325.

The “national contacts” test for personal jurisdiction under nationwide service of process statutes has not been addressed by the United States Supreme Court. In fact, it has been expressly avoided by the Court in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987) and in *Omni Capital International v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103 n.5 (1987)(“[w]e have no occasion’ to consider the constitutional issues raised by [the national contacts] theory”). However, employing similar reasoning to that in *Wichita Federal*, the Supreme Court in *Omni Capital* appears to reject the rationale of the national contacts theory by holding that the court’s in personam jurisdiction is not limited by Article III but by the Due Process Clause of the Fifth Amendment.

Omni’s argument that Art. III does not itself limit a court’s personal jurisdiction is correct. “The requirement that a court have personal jurisdiction flows not from

Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492(1982).

*Omni Capital*, 484 U.S. at 103-104. Because the *International Shoe* doctrine is premised on due process notions of the fairness and reasonableness of haling a defendant to a forum, *Omni Capital* and *Insurance Corp. of Ireland* at least call into question whether the Supreme Court would concur with courts which have adopted the "national contacts" test to determine personal jurisdiction under RICO.

Courts have not only differed in their interpretation of the jurisdictional requirements of RICO's nationwide service of process statute, they differ in which subsection under §1965 authorizes nationwide service of process. While the district court cases cited by Pugh have held that §1965(d) provides for nationwide service of process and personal jurisdiction under RICO, at least two circuit courts have otherwise concluded that §1965(b) is the nationwide service of process provision. *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668 (7th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988); *Butcher's Union Local No. 498, United Food and Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535 (9th Cir. 1986).

In *Lisak*, the Seventh Circuit Court of Appeals reversed an Illinois district court's dismissal of plaintiff's RICO claim against the individual defendant, Widmar, for lack of personal jurisdiction. Although Widmar was a resident of Florida, "had no dealings with Illinois," and any wrongs were committed in Indiana and Florida, plaintiff had invoked §1965(b) as the basis for the Illinois court's jurisdiction over Widmar. *Id.* at 671. The district court rejected plaintiff's argument finding that "section 1965 only addresses venue issues, not personal jurisdiction," and if §1965(b) did create personal jurisdiction, it would be unconstitutional because "a party may

never be hailed[sic] before a forum with which he does not have even the minimum contacts required to satisfy Due Process.” *Id.*

In reversing the dismissal, the Seventh Circuit rejected both propositions holding that (1) “[s]ection 1965(a) deals with venue in RICO cases, but §1965(b) creates personal jurisdiction by authorizing service. Service of process is how a court gets jurisdiction over the person”; and (2) because Congress has explicitly authorized nationwide service of process, §1965 “not only creates personal jurisdiction over anyone within the United States but also is consistent with the Due Process Clause of the fifth amendment.” *Id.* at 671-672 (viewing any due process limitation on federal courts in federal question cases as a territorial limitation on the sovereign).<sup>10</sup> Nationwide service of process is authorized under §1965(b) “so that at least one court will have jurisdiction over everyone connected with any RICO enterprise.” *Id.* at 672. Thus, the circuit court reasoned, the district court erred in not applying the “ends of justice” analysis required by §1965(b) to determine whether it had personal jurisdiction over Widmar.<sup>11</sup>

The Ninth Circuit in *Butcher’s Union* concurred with *Lisak* that §1965(b) creates

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<sup>10</sup> In discussing the difference between nationwide service of process in federal courts in federal question cases and minimum contacts with the forum requirements in diversity cases, the Seventh Circuit reasoned that [t]he question is whether the polity, whose power the court wields, possess a legitimate claim to exercise force over the defendant. A state court may lack such an entitlement to coerce, when the defendant has transacted no business within the state and has not otherwise taken advantage of that sovereign’s protection. A federal court sitting in a diversity case generally may issue process only within the territory a state court could, see Fed.R.Civ.P. 4; limitations on the power of the state therefore carry over to diversity litigation. A federal court in a federal question case is not implementing any state’s policy; it exercises the power of the United States.

*Id.* at 671. This rationale raises the question of whether a state court which has concurrent jurisdiction over RICO claims could be denied jurisdiction over nonresident RICO defendants, under the national contacts theory, when a federal court in that state could exercise jurisdiction over the same defendants.

<sup>11</sup> Although the *Lisak* court returned the case to the district court, it noted that the case would “not necessarily linger on the docket” because it was unlikely that the “ends of justice” would require Widmar’s presence in Illinois, as an Indiana court would have jurisdiction over him, and “it was hard to see how venue could be laid in Illinois,” citing 18 U.S.C. §1965(a) and 28 U.S.C. §1391(b).

nationwide service of process; however, it disagreed with *Lisak* in concluding that §1965(b)'s nationwide service of process effects personal jurisdiction over nonresident defendants only if one or more of the RICO defendants has minimum contacts with the forum state.<sup>12</sup> *Butcher's Union*, 788 F.2d at 538-39. Even then, the right to nationwide service of process is limited by the "ends of justice" requirement of §1965(b); *i.e.*, the court can assert personal jurisdiction over the nonresident defendants only if "there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." *Id.*; *see also Hawkins v. Upjohn Co.*, 890 F.Supp. 601, 606 (E.D. Texas 1994) (§1965(b) authorizes nationwide service of process for personal jurisdiction purposes; §1965(d) "merely authorizes nationwide service of 'other' process").

The agreed principles among these divergent rulings are that (1) a federal court has jurisdiction over a defendant if (a) a statute authorizes service of process; and (b) the exercise of personal jurisdiction does not contravene any constitutionally protected right of the defendant; and (2) RICO authorizes nationwide service of process (either under §1965(b) or (d)). The crucial question thus is what are the constitutional limits of the court's jurisdiction over a nonresident RICO defendant - the defendant's minimum contacts with the forum or with the

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<sup>12</sup> The plaintiff in *Butcher's Union* alleged that four employers, their officers, several attorneys and agents of National Maritime Union ("NMU") had engaged in union busting activities in violation of RICO. Only one of the four defendant employers, SDC Investment, had its principal place of business in California. The three nonresident employers, Denver Lamb, Montfort, and Eastern Market, moved to dismiss for lack of personal jurisdiction and improper venue. Finding that there were really four different conspiracies with each employer defendant allegedly conspiring with the defendant lawyers and NMU agents, the district court concluded that it only had jurisdiction over the conspiracy involving SDC, the California employer, and that pursuant to §1965(b), the "ends of justice" required the court to exercise personal jurisdiction over the nonresident lawyers and NMU.

Plaintiff appealed the district court's dismissal of Denver Lamb and Montfort (Eastern Market was not pursued) arguing that the ends of justice required nationwide service over Denver Lamb and Montfort. The Ninth Circuit upheld the district court's finding of separate conspiracies and dismissal of the nonresident defendants, concluding that the defendants lacked "minimum contacts" with California under California's long-arm statute.

United States?

### C. VENUE

The Court need not answer this question on the motions before it because Pugh has not established venue in this district for her RICO claim. It is prudential to reverse the order of decision when resolution of the venue issue resolves the case, and the more difficult constitutional issue does not have to be addressed. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180-81 (1979) (there is a “sound prudential justification “ for reversing the normal order of considering personal jurisdiction and venue when the question of venue resolves the matter and the Court need not reach constitutional due process concerns); *Mylan Laboratories, Inc. v. Akzo, N.V.*, 1990 WL 58466 (D.D.C. 1990). Regardless of whether §1965(b) or (d) is RICO’s nationwide service of process provision or whether due process requires minimum contacts with Oklahoma or with the United States, the requirements for venue under §1965(a) must be met. Notably, much of the concern with fairness to nonresident defendants raised in the “national contacts” debate regarding personal jurisdiction under RICO’s nationwide service of process is addressed by RICO’s venue statute. *Leroy*, 443 U.S. at 183-84 (1979)(purpose of statutory venue is “to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial”). Further, although the general rule in cases involving multiple claims is that venue must be proper to each claim, when the federal claim and state claims “amount to only one cause of action with [multiple] grounds for relief, proper venue as to one federal ground will support adjudication of [other] grounds.” *Beattie v. United States*, 756 F.2d 91, 100 (D.C. Cir. 1984) (quoting 1 J. Moore, *Moore’s Federal Practice* ¶0.142[3] (2d ed. 1984). Pugh’s state claims arise out of the same set of operative facts as her principal claim under RICO. Thus, venue

for the RICO claim will support adjudication of her state claims.

Defendants assert that this case should be dismissed or transferred because Pugh has failed to establish proper venue in this district. If venue is improper, the Court shall dismiss or transfer the action, thus mooted the question of personal jurisdiction. 28 U.S.C. §1406(a)( “[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”).<sup>13</sup>

As noted above, §1965(a) is RICO’s venue statute which lays venue in the district where the defendant “resides, is found, has an agent, or transact his affairs.” It is undisputed that none of the defendants resides in Oklahoma. Indeed in ¶2 of the Third Amended Complaint, Pugh states that “the corporate Defendants are incorporated under the laws of the state of California and have their principal places of business in a state other than the state of Oklahoma. The individual Defendants are not citizens of Oklahoma.” The issue then is whether any of the defendants “is found, has an agent, or transact his affairs” in Oklahoma.

“Is found” has been construed as “presence and ‘continuous local activities’ within the district.” *Payne v. Marketing Showplace, Inc.*, 602 F.Supp. 656, 659 (N.D.Ill. 1985); *Eastman v. Initial Investments, Inc.*, 827 F.Supp. 336, 338 (E.D.Pa. 1993); *Caribe Trailer Systems v. Puerto*

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<sup>13</sup> Some courts have required that venue under §1965(a) be satisfied before RICO’s nationwide service of process provision can confer in personam jurisdiction over nonresident defendants. *Damiani v. Adams*, 657 F.Supp. 1409, 1416 (S.D. Cal. 1987) (“The initial requirement which must be met to confer personal jurisdiction in a RICO action is set out in 18 U.S.C. §1965(a).”); *Caldwell v. Palmetto State Savings Bank*, 811 F.2d 916, 918 (5th Cir. 1987) (RICO statute does not provide basis for in personam jurisdiction unless venue requirements set out in §1965(a) are met); *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F.Supp. 1279, 1286 (S.D.N.Y. 1989) (“because the venue provision of §1965(a) was not satisfied, the expansive service provision of RICO was not available to [defendant] and could not confer personal jurisdiction over [another defendant]”). This reasoning, however, appears to confuse venue with personal jurisdiction.

*Rico Maritime Shipping Authority*, 475 F.Supp. 711 (D.D.C. 1979); *Mylan Laboratories, supra* at \*9. A person “transacts his affairs” within a district when he “regularly conducts business of a substantial and continuous nature within that district.” *Eastman*, 827 F.Supp. at 338. For corporate defendants, “transacts his affairs” is equivalent to “transacts business” and “connotes the same type of substantiality and regular contact.” *Mylan Laboratories, supra* at \*9. For individual defendants, “transacts his affairs” “refers to their personal affairs, not the affairs they may have transacted on behalf of their employer.” *Payne*, 602 F.Supp. at 658; *Bulk Oil (USA), Inc. v. Sun Oil Trading Co.*, 584 F.Supp. 36, 39 (S.D.N.Y. 1983).

Pugh asserts that venue is proper because each defendant can be found, transacts affairs and has agents in Oklahoma. The Court disagrees. The only entity identified in Pugh’s RICO statement and Third Amended Complaint as “found” in Oklahoma is Brookhaven Hospital, one of the Minirth Meier New Life Clinics, which is located in Tulsa, Oklahoma. However, neither Brookhaven nor Minirth Meier New Life Clinics is a defendant in this action. Nor has Pugh shown that any of the defendants “transacts his affairs” in this district. Pugh essentially tries to tie all the defendants to Oklahoma through New Life and/or Arterburn.<sup>14</sup> Pugh argues that New Life transacts its affairs in Oklahoma through national advertising and telemarketing, and Arterburn transacts his affairs or acts as New Life’s agent in Oklahoma because (1) he is the founder and chair of the Minirth Meier New Life Clinics and New Life, and one of the Minirth Meier New Life Clinics, Brookhaven Hospital, is located in Tulsa, Oklahoma; (2) Arterburn advertised the

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<sup>14</sup> Pugh argues that all contacts by New Life in Oklahoma should be considered contacts by Gross and Lee-Ada because (1) Gross is the founder of The Fred Gross Christian Therapy Program, the rights to which were ultimately sold to New Life; and (2) Lee-Ada was formerly known as Paraclete Psychiatric Services, the billing agent for New Life (Lee-Ada denies this allegation. *Affidavit of Kenneth E. Crump, Jr., Exhibit A to Reply to Plaintiff’s Response to Defendants’ Lee-Ada, Inc.’s and Frederick L. Gross’ Motion to Dismiss*).

Minirth Meier New Life Clinics on a Tulsa radio station; (3) books written by Arterburn referencing New Life's 800 number are sold in Tulsa; and (4) Arterburn presented a lecture and seminar at the Tulsa Doubletree Hotel in December 1994 as part of the Minirth Meier New Life seminar program.

New Life's national advertising and telemarketing does not constitute business of a substantial and continuous nature in Oklahoma so as to establish that New Life transacts its affairs in Oklahoma. To find otherwise would totally disregard the "local" character of venue. Similarly, Pugh's attempt to locate venue in Oklahoma through Arterburn does not succeed. First, the location of Brookhaven Hospital in Tulsa, advertising of and seminars presented on behalf of Minirth Meier New Life Clinics are irrelevant to the determination of venue as to the defendants in this case. The only connection drawn by Pugh between these entities and any of the defendants is that Arterburn is the founder and chair of both the Minirth Meier New Life Clinics and New Life, which are separate corporate entities. Further, any allegation that Arterburn was acting as an agent of nondefendants Minirth Meier New Life Clinics or Brookhaven by selling his books, advertising on local radio or presenting a lecture in a Tulsa hotel does not serve Pugh in establishing venue as to the defendants. Even if Arterburn engaged in these acts on behalf of defendant New Life, the allegations would not support a finding that New Life itself, or through Arterburn as its agent, was conducting business "of a regular, substantial and continuous nature." *Dody v. Brown*, 659 F.Supp. 541, 545-56 (W.D. Mo. 1987). Finally, there is absolutely no evidence that Arterburn was an agent of the Gross defendants.

The only connection between Oklahoma and the allegations giving rise to Pugh's RICO claim are the following correspondence Pugh received in the mail after relocating to Tulsa: a

forwarded bill from New Life to Pugh dated 12/11/92; a 12/18/92 letter from New Life to Pugh requesting permission to have the Van Nuys hospital release medical information “per our conversation today”<sup>15</sup>; a 2/18/93 letter from New life to Pugh again requesting a release of medical information at the Van Nuys hospital; a 2/24/93 letter from New Life to Pugh apologizing for her negative experience at the Van Nuys hospital and enclosing the Authorization and Acknowledgement Form Pugh signed authorizing the hospital to provide medical information to MetLife; and a 3/12/93 letter from New Life to Pugh concluding that there was nothing else New Life could do for her. *Exhibits E,F,G,H, and I, Response of Plaintiff Mildred Pugh to Defendants' Supplemental Motion to Dismiss or in the alternative to Transfer Venue.* The Court finds that the receipt of these bills and letters addressing Pugh’s concerns regarding her treatment in California at the Van Nuys hospital is also insufficient to show that any of the defendants were found or transacted affairs in Oklahoma. *Eastman*, 827 F.Supp. at 338 (correspondence and calls received in Pennsylvania, one defendant attending an event in Pennsylvania, and two defendants seen together at a trade show in Pennsylvania, deemed insufficient to establish venue in Pennsylvania under §1965(a) ); *Dody*, 659 F.Supp. at 546 (“the only contacts that defendants had with this forum are telephonic communications made by defendants from outside of this district, mailings made from outside of the district . . . and such activity does not rise to the level of regular, substantial and continuous activity within the district so as to satisfy §1965(a)’s transaction of affairs requirement”); *Miller Brewing Co. v. Landau*, 616 F.Supp. 1285, 1290 (E.D. Wis. 1985)(venue improper as to three defendants who did nothing other than make

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<sup>15</sup> Presumably, there was also at least one telephone conversation between Pugh and New Life while she was a resident of Oklahoma.

telephone calls and send a single letter to plaintiff in district).

Neither is Pugh helped by the general venue statute for federal question cases, 28 U.S.C. §1391(b). Several courts have held that RICO's venue statute supplements rather than substitutes for the venue requirements under §1391(b). *see e.g., Lisak*, 834 F.2d at 672; *Rolls-Royce Motors*, 657 F.Supp. at 1058; *Monarch Normandy*, 817 F.Supp. at 904; *Wichita Federal*, 674 F.Supp. at 328-29; *Eastman*, 827 F.Supp. at 338; *Farmers Bank v. Bell Mortgage Corp.*, 452 F.Supp. 1278, 1280-81 (D.Del. 1978). Section 1391(b) in pertinent part designates venue in the district in which all defendants reside or in which a "substantial part of the events or omissions giving rise to the claim occurred." Pugh was a resident of Texas at the time she responded to the New Life ad and was induced by the telemarketer to enter the Program and to change her insurance coverage; the remaining acts, other than the receipt of correspondence noted above, occurred in the Central District of California where Pugh traveled for treatment under the Program. The Court finds that the substantial part of the events giving rise to Pugh's RICO claim thus occurred in the Central District California where Pugh received the alleged fraudulent treatment. Furthermore, all of the defendants reside in California and venue is clearly proper as to every defendant in the Central District of California both under RICO's special venue statute, 18 U.S.C. §1965(a) and under the general venue statute, 28 U.S.C. §1391(b).

For these reasons, the Court concludes that venue does not lie in the Northern District of Oklahoma, and, given the time the case has been on the Court's docket, transfer to the Central District of California, rather than dismissal, of this case is "in the interest of justice." 28 U.S.C. §1406(a).

#### **D. TRANSFER UNDER 28 U.S.C. §1404(A)**

Even if venue were proper in this district, the Court concludes that the case should be transferred to the Central District of California under 28 U.S.C. §1404(a). Section 1404(a) provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” As noted above, this action could have been brought in the Central District of California where all the defendants reside, are found, transact their affairs, and where a “substantial part of the events or omissions giving rise to the claim occurred.” Thus, in determining whether transfer to the Central District of California is appropriate, the Court is to consider the factors set forth in *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991), which include “plaintiff’s choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to ensure attendance of witnesses; the cost of making the necessary proof, . . . and, all other considerations of a practical nature that make a trial easy, expeditious and economical.”

Although considerable weight is given to plaintiff’s choice of forum, *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992), the Court finds that the balance of the factors advises transfer. Discovery in this case has been stayed pending the Court’s decision on the motions to dismiss, so there will be no duplication of judicial resources by the transferee court. In addition, the majority of the witnesses, parties and exhibits are located in California. Although Pugh argues that it would be unduly burdensome, if not impossible, for her to litigate in California as she does not have the financial resources to do so, the Court is not persuaded. If the case remained here, the bulk of discovery would still have to be pursued in California. In sum, even if venue lay here,

which the Court concludes it does not, this case should be transferred for the convenience of the parties and in the interest of justice under §1404(a).

#### **E. ORDERS**

For the foregoing reasons, the Court grants defendants' motions to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3), or in the alternative, grants defendants' motion to transfer venue under 28 U.S.C. §1404(a); and denies defendants' motions to dismiss Pugh's RICO claim for failure to state a claim under Fed.R.Civ.P. 12(b)(6). (The Court does not reach defendants' motions to dismiss the remaining claims). Accordingly, defendants' motions to dismiss for lack of personal jurisdiction under Fed.R.Civ.P. 12(b)(2) (Docket Nos. 3 and 32) and Plaintiff's Applications for Scheduling Conference (Docket No. 38) and for Order Scheduling Case Management Conference (Docket No. 40) are rendered moot.

ORDERED this 3<sup>rd</sup> day of June, 1996.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE 6-5-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER L. DAVIS aka CL Davis;  
MARVA DAVIS aka Marva L. Davis;  
TRIAD BANK, NA; STATE OF  
OKLAHOMA, ex rel. OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Osage County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Osage  
County, Oklahoma,

Defendants.

**FILED**

JUN 4 - 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

970  
Civil Case No. 95cv 670H

**CLERK'S ENTRY OF DEFAULT**

It appearing from the files and records of this Court as of June 4, 1996 and  
the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants,  
**Christopher L. Davis aka CL Davis and Marva Davis aka Marva L. Davis**, against whom  
judgment for affirmative relief is sought in this action have failed to plead or otherwise defend  
as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of  
Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 4th day of June, 1996.

PHIL LOMBARDI, Clerk  
United States District Court for  
the Northern District of Oklahoma

By J. Adamski  
Deputy



Dated at Tulsa, Oklahoma, this 4th day of June, 1996.

**PHIL LOMBARDI**, Clerk  
United States District Court for  
the Northern District of Oklahoma

By A. Adamski  
Deputy

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 6-5-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD R. SEIGFRIED; PAULA R.  
SEIGFRIED fka PAULA R. KELLER;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**F I L E D**

JUN 4 - 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 1083H

**CLERK'S ENTRY OF DEFAULT**

It appearing from the files and records of this Court as of June 4 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, **Donald R. Seigfried and Paula R. Seigfried fka Paula R. Keller**, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 4th day of June, 1996.

PHIL LOMBARDI, Clerk  
United States District Court for  
the Northern District of Oklahoma

By A. Adamski  
Deputy

74/46  
SA

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 6-5-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DENNIS DERAL REED aka DENNIS D.  
REED; LINDA REED aka DELINDA  
REED; COUNTY TREASURER, Tulsa  
County, Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**F I L E D**

JUN 4 - 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 1068H

**CLERK'S ENTRY OF DEFAULT**

It appearing from the files and records of this Court as of June 4 1996 and  
the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants,  
**Dennis Deral Reed aka Dennis D. Reed and Linda Reed aka DeLinda Reed**, against whom  
judgment for affirmative relief is sought in this action have failed to plead or otherwise defend  
as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of  
Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 4th day of June, 1996.

PHIL LOMBARDI, Clerk  
United States District Court for  
the Northern District of Oklahoma

By L. Adamish  
Deputy

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 6-4-96

EUGENE FINCH and VESTA FINCH, )  
Parents and Next Friends of )  
TYRONE L. FINCH, a minor child, )  
 )  
Plaintiffs, )

**F I L E D**

JUN 3 - 1996

vs. )

Case No. 96-C-0243C

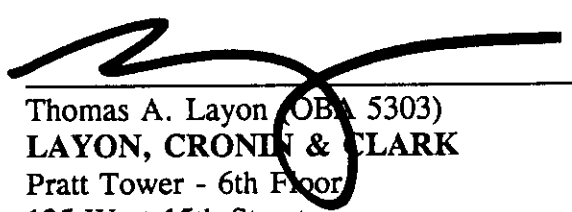
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FANELLI BROTHERS TRUCKING )  
COMPANY, a foreign corporation, )  
LINCOLN GENERAL INSURANCE )  
COMPANY, H. RAY BOWLES and )  
JENNIFER BOWLES d/b/a BOWLES )  
TRUCKING COMPANY, ASSOCIATES )  
INSURANCE COMPANY, and )  
BOBBY B. BOWLES, )  
 )  
Defendants. )

**NOTICE OF DISMISSAL**

COME NOW the Plaintiffs and hereby dismiss their causes of action against Defendant  
ASSOCIATES INSURANCE COMPANY without prejudice.

Authority: Rule 41(a)(1)(i), Federal Rules of Civil Procedure.

  
Thomas A. Layon (OBA 5303)  
**LAYON, CRONIN & CLARK**  
Pratt Tower - 6th Floor  
125 West 15th Street  
Tulsa, OK 74119  
(918) 583-5538  
Attorney for Plaintiffs

**CERTIFICATE OF MAILING**

I, Thomas A. Layon, do hereby certify that on this 31 day of May, 1996, I caused to be mailed a true and correct copy of the above and foregoing document with first-class postage fully pre-paid to:

Ms. Michelle K. Anderson  
**ASSOCIATES INSURANCE COMPANY**  
P.O. Box 660028  
Dallas, TX 75266-0028  
Vice President and Assistant General  
Counsel for Associates Insurance Company

Mr. Henry D. Hoss, Esq.  
**MCAFEE & TAFT**  
211 North Robinson, 10th Floor  
Oklahoma City, OK 73102-7101  
Attorney for Defendants FANELLI,  
LINCOLN GENERAL & BOBBY BOWLES

  
\_\_\_\_\_  
Thomas A. Layon

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

~~FILED~~

~~MAY 30 1996~~

~~Phil Lombardi, Clerk  
U.S. DISTRICT COURT~~

SAMUEL CHAVOUS

Plaintiff,

vs.

No. 96-C-237-E ✓

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY,

Defendant.

**FILED**

MAY 31 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

**ORDER**

DATE JUN 04 1996

Before the Court is the Motion to Remand, Motion for Sanctions for Improvident Removal, and Motion to Hold Further Proceedings in Abeyance until the Court Rules on Plaintiff's Motion to Remand (Docket No. 6) filed by the plaintiff Samuel Chavous ("Chavous").

This case was originally filed in Oklahoma County District Court on September 13, 1994 and proof of service on defendant State Farm Mutual Automobile Insurance Company ("State Farm") was filed on September 21, 1994. On State Farm's motion, the Oklahoma County District Court transferred the case to Tulsa County District Court on November 22, 1994. On March 1, 1996, Chavous filed an Amended Petition with a request to seek discovery for possible class certification. The Tulsa County District Court ordered State Farm to comply with discovery requests by March 25, 1996. On March 25, 1996, State Farm filed its Notice of Removal and removed the case to this Court.

Chavous asserts that pursuant to 28 U. S.C. §1446(b), the case must be remanded as it was removed more than one year from the commencement of the lawsuit. Section 1446(b) states:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, **except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.**

28 U.S.C. §1446(b) (emphasis added).

The Court agrees with the plain reading of the statute set forth in *Burke v. Atlantic Fuels Marketing Corp.*, 775 F.Supp. 474 (D. Mass. 1991).

Taken *together*, the first and second paragraphs of that section allow a defendant to remove an action to federal court within thirty days, unless the ground for removal appears after the initial pleading, in which case the defendant may remove the action within thirty days of the appearance of the ground for removal so long as, in diversity cases, the petition for removal is filed within a year of the initial pleading.

*Id.* at 476. The parties agree that this case was removable as a diversity case when it was originally filed in September 1994 and State Farm did not do so within thirty days after service. Thus, the second paragraph of §1446(b) does not apply. Even if the ground for removal did not appear until after the filing of Chavous' Amended Petition, State Farm failed to remove the case within one year of the filing of Chavous' initial Petition. State Farm's removal was therefore untimely and the Court remands the case to Tulsa County district court.

The Court also finds sufficient merit in State Farm's argument for removal to deny Chavous' motion for sanctions. As the Court grants Chavous' motion to remand, the motion to hold further proceedings in abeyance is rendered moot. (Docket No. 6).

ORDERED this 30<sup>th</sup> day of May, 1996.

A handwritten signature in black ink, appearing to read "James O. Ellison". The signature is fluid and cursive, with a prominent initial "J".

JAMES O. ELLISON  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 31 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL PEARSON,

Plaintiff,

vs.

JIM NORTON-BUICK, ED WILLIAMS, DENISE

LESLIE, GINA JOHNSON,

Defendants.

Case No. 95-C-1212-E

ENTERED ON DOCKET

DATE JUN 04 1996

ORDER

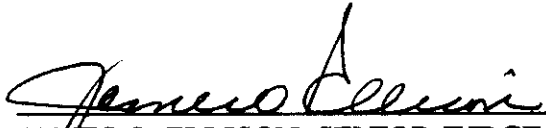
This matter is before the Court on consideration of whether it is frivolous and should be dismissed pursuant to 28 U.S.C. §1915(d) which provides, in pertinent part: "The court may . . . dismiss the case . . . of satisfied that the action is frivolous or malicious." A complaint is frivolous if "after looking at both the factual allegations and legal conclusions, it appears that the complaint 'lacks an arguable basis in either law or in fact.'" Taylor v. Wallace, 931 F.2d 698, 700 (10th Cir. 1991). A complaint may be dismissed as frivolous, for example, where a plaintiff has failed to exhaust administrative remedies. See, Rourke v. Thompson, 11 F.3d 47 (5th Cir. 1993).

In this matter, plaintiff asserts that, through false accusations of the defendants, he was terminated from his employment at Jim Norton Buick, and his "credibility and employability in this area have been damaged beyond repair." Thus, the court construes plaintiff's claims to lie in wrongful termination and slander. Since Plaintiff does not make a claim that arises "under the Constitution, laws, or treaties of the United States," this Court's jurisdiction would necessarily be based on diversity. Plaintiff, however, does not allege diversity jurisdiction, and, it is apparent from

the face of the complaint that diversity, pursuant to 28 U.S.C. §1332 does not exist. Plaintiff is a citizen of the state of Oklahoma suing a corporation with its principal place of business in Oklahoma and employees of that corporation.

Therefore this matter is dismissed as frivolous pursuant to 28 U.S.C. §1915(d).

IT IS SO ORDERED THIS 30<sup>th</sup> DAY OF MAY, 1996.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARKUS ALLEC RICE, a minor,  
by and through his mother and  
next friend, ANGELA DANITA  
RICE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ENTERED ON DOCKET

DATE JUN 04 1996

No. 94-C-264-K

FILED

JUN 03 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

J U D G M E N T

This matter came before the Court for nonjury trial. The issues having been duly considered by this Court and a decision having been rendered in accordance with the Memorandum of Decision filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

ORDERED THIS DAY OF 31 MAY, 1996

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARKUS ALLEC RICE, a minor, )  
by and through his mother and )  
next friend, ANGELA DANITA )  
RICE, )

Plaintiff, )

vs. )

UNITED STATES OF AMERICA, )

Defendant. )

No. 94-C-264-K ✓

ENTERED ON DOCKET  
JUN 04 1996

FILED  
JUN 03 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MEMORANDUM OF DECISION

This is a civil action for monetary damages pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671-80, brought by Markus Allec Rice ("Markus"), a minor, by his mother and next friend, Angela Danita Rice ("Ms. Rice"), against the United States of America. Following a nonjury trial in the above-styled action, this Court now finds the facts and states its conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

Prior to trial, this Court entered an order denying the government's motion for summary judgment based on the statute of limitations. (See Order of May 19, 1995 ("Order").) This Court held, "The applicability of the statute of limitations turns on the resolution of issues of fact and credibility of key witnesses." (Order at 15.) This Court held that it was not prepared to make such a determination based on the pleadings, but that if the government was able to show at trial that the statute of

limitations had expired prior to Plaintiff's filing of his Complaint, the Court would enter judgment for the government. Based on the evidence at trial, it is now the holding of this Court that the government has made such a showing.

I. Findings of Fact

Ms. Rice was 17 years old when she was diagnosed as pregnant. She had a ninth-grade education. It was her first pregnancy. Her son, Markus, was born on October 3, 1990 at Claremore Indian Hospital ("CIH"), a government facility. Ms. Rice delivered Markus by cesarean section after labor could not be induced. She was approximately three weeks past due. At delivery, medical personnel noted meconium stained amniotic fluid. Meconium constitutes the first stools of the newborn infant. The pediatrician suctioned 4 cc of meconium stained amniotic fluid from Markus's stomach and resuscitated him with oxygen blow and by cutaneous stimulation. Although vital signs were positive during the morning and early afternoon, a nurse found Markus to be deeply cyanotic and making grunting respirations at 4 p.m. After performing various emergency measures, CIH contacted the Saint Francis Hospital Eastern Oklahoma Perinatal Center ("EOPC").

An EOPC transfer team arrived at CIH to transfer Markus from CIH to EOPC. EOPC transport nurse Deborah Anne Kurtz noted on the transport record that Markus suffered from respiratory distress/meconium aspiration. Ms. Kurtz spoke with Ms. Rice to explain why Markus was being transported to Saint Francis Hospital,

EOPC. Although Ms. Kurtz had no independent recollection of her conversation with Ms. Rice, Ms. Kurtz testified that it was her customary practice to explain the nature of the baby's problems, including their cause or causes, and why the baby was being transferred.

Dr. Alfred Vitanza, a neonatologist, treated Markus at Saint Francis Hospital. Due to Markus's deteriorating condition, Dr. Vitanza and other conferring physicians determined that Markus should be placed on extra corporal membrane oxygenation ("ECMO"), an artificial heart-lung machine used in emergency cases. Without such a procedure, Dr. Vitanza believed Markus faced an 80 percent mortality risk. Dr. Vitanza contacted Ms. Rice by telephone on October 5, 1990 at 4 a.m. to obtain parental consent to perform the procedure. Dr. Vitanza testified at trial that he had independent recollection of that telephone conversation and was certain (ten on a scale of one-to-10) that he told Ms. Rice that the cause of Markus's respiratory problems was his swallowing of bowel movement or poop into his lungs.

On January 10, 1991, Markus was treated for an ear infection by Dr. Faith Holmes at the Indian Health Care Resource Center in Tulsa, Oklahoma. In Dr. Holmes's records of the visit, there is a notation indicating a medical history of meconium aspiration. Dr. Holmes testified that any information regarding Markus's medical history in the chart would have come from whomever brought him into the Indian Health Care Resource Center, not from other medical records or communications with physicians. Dr. Holmes came to this

conclusion for the following reasons: (1) she customarily takes an independent history from the mother or other adult accompanying the child patient; (2) she made no notation in her medical history that she relied on any source other than the person accompanying Markus at the visit; (3) had she relied on any source other than the person accompanying Markus, such as medical records from St. Francis or Claremore, she would have so noted in her records, and there was no such notation; and (4) there were no medical records from another medical or health care facility in Markus's file at the Indian Health Care Resource Center, and if Dr. Holmes had referred to Markus's medical records from another facility at any time, those outside records would have been placed in Markus's file at the Indian Health Care Resource Center. Ms. Rice admits that she took Markus to the Indian Health Care Center on or about January 10, 1991.<sup>1</sup>

Ms. Rice maintains that she did not learn that Markus's condition was caused by meconium aspiration until October 2, 1992. She claims that she had always been told by health care providers

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<sup>1</sup> On the same medical record there is another notation, apparently written by Brenda Cummings, an employee of the Indian Health Care Resource Center. Ms. Cummings, who did not testify at trial, would take the patient's medical history before Dr. Holmes saw the patient. Ms. Cummings' notation states that Markus had been hospitalized for one month after birth for "swallowing stools." Dr. Holmes testified that she did not rely on Ms. Cummings' notation, but took her own independent history.

There was additional documentary evidence at trial that Ms. Rice was aware of meconium aspiration as early as 1991. In a medical record from the Tulsa Regional Medical Center (Def. ex. 53 at p.321), dated July 25, 1991, there is a notation under "Nursing Observations" that says, "Mom states pt. was meconium stained @ birth and has had 'asthma like' probs since."

that Markus was born with a breathing problem, which she understood to mean that his condition was hereditary. Ms. Rice says that she was told about Markus's aspiration of meconium for the first time on October 2, 1992 by Dr. Charles Cooper, a pediatric cardiologist whom she saw when she was pregnant with a second child. Under the apparent belief that Markus's condition was hereditary, Ms. Rice claims that she asked Dr. Cooper about the chances of her second child developing the same health problems as Markus. Ms. Rice testified that Dr. Cooper told her that Markus's breathing problems were not hereditary, but resulted from Markus inhaling poop into his lungs. Ms. Rice testified that it was only after her conversation with Dr. Cooper that she came to think that CIH may have caused Markus's injury. At trial Dr. Cooper testified that he had no independent recollection of this conversation with Ms. Rice. He stated that there is no mention of such a conversation in his medical records and that he believed that had that conversation taken place, he would have noted it in his records.

On April 23, 1993, Ms. Rice filed an administrative claim in the amount of \$15,000,000, which was denied on October 25, 1993. In the Complaint filed on behalf of Markus, Ms. Rice claims that health care providers at CIH rendered negligent medical care by allowing Ms. Rice to progress in her pregnancy for forty-three weeks without timely and appropriate intervention, failing to monitor adequately the condition of Ms. Rice and Markus, failing to suction and intubate Markus properly, failing to monitor Markus following delivery, failing to diagnose and treat Markus's

condition in a timely manner, and failing to transport Markus to another facility equipped to treat high-risk infants. Ms. Rice claims that as a result of CIH's negligence, Markus presently suffers from severe lung damage, a heart problem, and developmental delay.

## II. Conclusions of Law

Prior to trial, the United States moved for summary judgment, asserting that Plaintiff had not filed an administrative claim within two years after the claim accrued, as required by the FTCA. 28 U.S.C. § § 1346(b), 2401(b) ("A tort against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ."). Since Ms. Rice filed her administrative claim on April 23, 1993, Markus's claim would be time-barred if the action accrued prior to April 23, 1991.

In United States v. Kubrick, 444 U.S. 111 (1979), the Supreme Court construed 28 U.S.C. § 2401(b)--the limitations provision of the FTCA--in the context of medical malpractice actions. The Court adopted the general rule that a cause of action accrues under the FTCA when "the plaintiff has discovered both his injury and its cause." Id. at 120. Accrual does not however require knowledge of negligence. Id. at 123. The Tenth Circuit has interpreted Kubrick to place an inquiry burden upon FTCA claimants: they must exercise reasonable diligence in inquiring as to the cause of the injury. Arvayo v. United States, 766 F.2d 1416, 1422 (10th Cir. 1985). The

Fifth Circuit has interpreted this inquiry burden to mean that a claimant has constructive knowledge of cause sufficient to trigger the statute of limitations when that claimant "has knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection between the relevant treatment and injury or (b) to seek professional advice, and then with that advice, to conclude that there was a causal connection between the treatment and injury." MacMillan v. United States, 46 F.3d 377, 381 (5th Cir. 1995) (quoting Harrison v. United States, 708 F.2d 1023, 1027 (5th Cir. 1983)).

That Ms. Rice was aware of Markus's condition is not in dispute; she clearly knew that there was something wrong with her child within hours of his birth. The accrual of the statute of limitations therefore hinges on her knowledge of the cause of Markus's condition. The testimony and records of Drs. Vitanza and Holmes establish that Ms. Rice was aware of the *medical* cause of Markus's condition<sup>2</sup> more than two years before she filed her administrative claim. The question, therefore, is whether a reasonable person<sup>3</sup> knowing that Markus aspirated meconium at or before birth would inquire into whether there was a causal

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<sup>2</sup> Medical cause--here, meconium aspiration--is distinguishable from the issue of whether actions, or inactions, of CIH personnel caused Markus's injury. See Arvayo, 766 F.2d at 1420. In the instant context, it is the latter sense of "cause" that applies to the Kubrick test.

<sup>3</sup> Ms. Rice's conduct will be measured against a reasonable 17 to 19-year-old first-time mother with a ninth-grade education. See Arvayo, 766 F.2d at 1422 (establishing an objective standard and rejecting plaintiffs' argument that the standard encompasses subjective beliefs).

connection between his injury and the treatment he received at CIH.<sup>4</sup> If a reasonable person would so inquire, Ms. Rice is charged with constructive knowledge of the "cause" of Markus's injury, and the statute of limitations accrues from the date she knew about the meconium aspiration.

This Court need not answer this question, since Ms. Rice has answered it herself. Ms. Rice testified that once she was told that Markus's condition was caused by the aspiration of meconium, she suspected that CIH might be responsible. She consequently sought legal advice. Ms. Rice claims that she did not acquire this knowledge until October 1992, in her conversation with Dr. Cooper, and therefore argues that the statute of limitations should not accrue until that date. However, the record demonstrates that she had this knowledge at least as early as January 1991. Thus the statute of limitations accrued more than two years prior to her filing the administrative claim,<sup>5</sup> and her FTCA claim is time-

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<sup>4</sup> The Tenth Circuit explained this inquiry burden as follows:

Inasmuch as the plaintiff in Gustavson was not explicitly informed as to a possible connection between the lump in his neck and his kidney problems in 1973, this court implicitly placed a burden upon him to discover not only whether these doctors breached a duty to him, but also to discover in the first instance whether there was a causal connection between their actions, or inactions, and his injury.

Arvayo, 766 F.2d at 1422 (citing Gustavson v. United States, 655 F.2d 1034 (10th Cir. 1981)).

<sup>5</sup> This Court does not hereby hold that knowledge of meconium aspiration necessarily constitutes constructive knowledge of "cause" sufficient to trigger the statute of limitations. Rather, it is conceivable that a young first-time mother would reasonably believe that aspiration of meconium was a potential and unavoidable complication of birth. However, the record does

barred.

IS IS SO ORDERED THIS 31 DAY OF MAY, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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not support such a finding in the instant case.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

DONNA PADDOCK d/b/a CARDS BY DONNA,

Plaintiff,

vs.

STEVEN STEWART AND ASSOCIATES, INC.,  
a Texas corporation, ALL AMERICAN  
SERVICE CORP., INC., a Texas corporation,  
DAVID RHOADS, an individual, and KEN  
RAMS, an individual,

Defendants.

ENTERED ON DOCKET  
DATE JUN 04 1996

No. 95-C-1254-K

**FILED**

JUN 03 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Now before this Court is the motion of Defendants David Rhoads ("Rhoads") and Ken Rams ("Rams") to dismiss for lack of personal jurisdiction. The Plaintiff, Donna Paddock d/b/a Cards by Donna ("Paddock") commenced this action against Defendants pursuant to 28 U.S.C. § 1332, claiming various actions in contract and tort. Paddock alleges that Rhoads and Rams, who were employees of Steven Stewart and Associates, Inc. ("Steven Stewart") formed a new corporation, All American Service Corporation, Inc. ("All American") for the purpose of interfering with Paddock's franchise agreement with Steven Stewart Associates to sell greeting cards in Oklahoma.

Generally, a plaintiff bears the burden of proof to establish that jurisdiction over the parties is proper. See Yarborough v. Elmer Bunker & Assoc., 669 F.2d 614, 616 (10th Cir.

1982). In the context of pre-trial motions to dismiss decided without a hearing, a plaintiff must make only a prima facie showing as to the propriety of personal jurisdiction. See Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988). In ruling on motions under Rule 12(b)(2), the court considers the averments of the complaint and the affidavits and other evidentiary materials submitted by the parties. See Ten Mile Indus. Park v. Western Plains Service Corp., 810 F.2d 1518, 1524 (10th Cir. 1987). The well pled factual averments of the complaint are accepted as true, unless controverted by the defendant's evidentiary materials. See Pytlik v. Professional Resources, Ltd., 887 F.2d 1371, 1376 (10th Cir. 1989). Factual disputes arising from the evidentiary materials are resolved in favor of the plaintiff. See Behagen v. Amateur Basketball Ass'n, 744 F.2d 731, 733 (10th Cir. 1984), cert. denied, 471 U.S. 1010 (1985).

Defendants Rhoads and Rams, who have been sued in their individual capacities, move to dismiss for lack of in personam jurisdiction. They acknowledge having had contacts with the forum, and do not argue that this contact would be constitutionally insufficient to support jurisdiction if it was properly attributed to them personally. Rather, they assert that their contacts with the forum were as officers of two of the defendant Texas corporations: Steven Stewart and All American.

By implication they invoke the fiduciary shield doctrine, whereby exercise of personal jurisdiction over an individual may not be based solely on acts that individual performed in a purely representative capacity. See Home-Stake Production v. Talon Petroleum, 907 F.2d 1012, 1017 (10th Cir. 1990).<sup>1</sup> Paddock seems to argue that the corporation, All American, that Rhoads and Rams claim to have represented in the commission of the allegedly tortious conduct, was a mere shell; therefore, Rhoads and Rams should be subject to this Court's jurisdiction as individuals.

The Tenth Circuit, quoting the Second Circuit, has summarized the place of fiduciary shield analysis in alter ego cases such as this one:

"As an equitable principle, the fiduciary shield doctrine is not applied mechanically; the determination of the appropriateness of its application requires an analysis of the particular facts of the case. In each instance, fairness is the ultimate test.... In evaluating the fairness of subjecting an individual to personal jurisdiction for acts done in his role as a corporate employee, it is appropriate to focus not only on the fealty of the employee to the corporation in the performance of those acts, but also on the nature of the corporation and the individual's relationship to it. If the corporation is a mere shell for its owner, the employee-owner's actions may be viewed as having been taken simply in his own interest. In such circumstances it will not advance notions of fairness to allow the owner of the corporation to invoke the protections of the fiduciary shield.... In deciding whether the corporation is a real or a shell entity, the appropriate standard should not be the very stringent test, normally

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<sup>1</sup> Stated another way, the fiduciary-shield doctrine holds that an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction over that individual though the state has in personam jurisdiction over the corporation. See Stuart v. Spademan, 772 F.2d 1185, 1197 (5th Cir. 1985).

applied in other contexts, for piercing the corporate veil. That test requires a showing not only that the corporation is a shell, but that it was used to commit a fraud. When both of these showings are made the corporate entity is disregarded, and the individuals behind the corporate shell are held responsible for its liabilities. The fiduciary shield doctrine, however, is not concerned with liability. It is concerned with jurisdiction, and specifically with the fairness of asserting jurisdiction over a person who is acting solely in the interests of another. In determining whether a corporation for which an owner-employee acts is really 'another,' it is sufficient to inquire whether the corporation is a real or shell entity. If the corporation is merely a shell, it is equitable, even if the shell may not have been used to perpetrate a fraud, to subject its owner personally to the court's jurisdiction to defend the acts he has done on behalf of his shell." Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 903 (2nd Cir.1981) (citation omitted).

Home-Stake, 907 F.2d at 1017-18.

To determine whether Rhoads' and Rams' contacts with the forum may be attributable to them personally, Paddock must demonstrate that the corporation on whose behalf Rhoads and Rams was allegedly acting--All American--was in fact a mere instrumentality. Id. at 1018. The Tenth Circuit has held, for purposes of determining in personam jurisdiction, that

under Oklahoma law a corporation may be deemed to be a mere instrumentality of an individual if (1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation or vice versa, (4) corporate formalities are not followed, or (5) the corporation is merely a sham.

Id. at 1018 (citing Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 638 (8th Cir.1975); Fish v. East, 114 F.2d 177, 191 (10th Cir.1940)).

Paddock has failed to demonstrate that All American was a mere instrumentality of Rhoads and Rams. She asserts that Rhoads and Rams "creat[ed] All American Service Corporation for the express designed purpose of using it as an instrumentality to cause loss to the Plaintiff and used the separate corporation as an instrument by which they interfered in the relationship between the Plaintiff and Steven Stewart," (Plaint. Resp. at 1-2). However, she fails to provide any evidence to support a finding under one of the factors enumerated in Home-Stake, *supra*.<sup>2</sup> See Yarborough v. Elmer Bunker & Assoc., 669 F.2d 614, 616 (10th Cir. 1982) (placing burden on plaintiffs to establish that jurisdiction over parties is proper). Absent such a showing, this Court cannot attribute All American's contacts with Oklahoma to Rhoads or Rams for jurisdictional purposes.

The motion to dismiss of Rhoads and Rams is therefore GRANTED. However, if, in the course of litigation, there emerges sufficient evidence to support Paddock's claims with respect to the nature of All American, this Court may revisit the issue.

IT IS SO ORDERED THIS 31 DAY OF MAY, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> In her Complaint, Paddock states, "All American was formed by David Rhodes [sic] and Ken Raams [sic], as a separate company in order to rebrandise the same territory in violation of the contract and to Plaintiff's detriment." (Compl. ¶ 10.) There are no factual averments in the complaint to support a finding under one of the Home-Stake factors.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED** 7  
MAY 31 1996 CA

HORSEHEAD INDUSTRIES, INC. d/b/a  
ZINC CORPORATION OF AMERICA,

Plaintiff,

vs.

ST. JOE MINERALS CORPORATION,  
FLUOR CORPORATION, CYPRUS  
AMAX MINERALS COMPANY, and  
SALOMON, INC..

Defendants.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 94-C-98-B /

ENTERED ON DOCKET  
DATE **JUN - 4 1996**

**JUDGMENT**

This action came on for trial before the Court, Honorable Thomas R. Brett, Chief District Judge, presiding, and the issues having been duly tried and Amended Findings of Fact and Conclusions of Law having been duly entered on May 7, 1996, the Court hereby declares and enters Judgment as follows:

1. Judgment is entered in favor of Plaintiffs/Counterdefendants, Horsehead Industries, Inc., d/b/a Zinc Corporation of America ("ZCA"), St. Joe Minerals Corporation ("St. Joe"), Fluor Corporation ("Fluor"), and Salomon, Inc. ("Salomon"), and against Defendant/Counter-claimant Cyprus Amax Minerals Company ("Cyprus") on Plaintiffs' claims under 42 U.S.C. §§ 9607 and 9613(f). Plaintiffs recover from Cyprus the sum of \$3,136,842 (representing 30% of the past, On-Site, necessary costs of response incurred by Plaintiffs/Counter-Defendants, identified in Finding of Fact No. 99), plus prejudgment

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interest through May 30, 1996, in the amount of \$255,754 (representing 30% of the prejudgment interest of \$852,514 calculated on all past response costs incurred by Plaintiffs as identified in Finding of Fact No. 99), as provided for and calculated at the rate prescribed by 42 U.S.C. § 9607(a)(4)(D), with post-judgment interest to accrue thereon until the amount owing is paid.

2. Defendant/Counterclaimant Cyprus is adjudged severally liable to Plaintiffs/Counterdefendants, ZCA, St. Joe, Fluor, and Salomon, by way of contribution pursuant to 42 U.S.C. § 9613(f), for thirty percent (30%) of the necessary costs of response, pursuant to 42 U.S.C. § 9607(a)(4)(B), which Plaintiffs/Counterdefendants have incurred and paid (and not previously sought from the Court), and shall pay in the future, to the United States, the State of Oklahoma, or any other party, in connection with the On-Site Area at the Bartlesville Facility. However, pursuant to their acknowledged commitment, Plaintiffs are allocated full responsibility for the past and future remediation costs associated solely with their goethite, nickel/cobalt, hot tower precipitate and Cherryvale waste pile deposits, and the ground thereunder, located in the northwest portion of the Bartlesville Facility.

3. Judgment is entered in favor of Defendant/Counterclaimant Cyprus and against Plaintiffs/Counterdefendants on Cyprus' counterclaims under 42 U.S.C. §§ 9607 and 9613(f). Defendant/Counterclaimant Cyprus recovers from Plaintiffs/Counterdefendants the sum of \$400,571 (representing 70% of the past, Off-Site, necessary costs of response incurred by Cyprus, identified in Finding of Fact No. 86), plus prejudgment interest through May 30, 1996, in the amount of \$14,445 (representing 70% of the prejudgment interest of \$20,636

calculated on all past response costs incurred by Cyprus as identified in Finding of Fact No. 86), as provided for and calculated at the rate prescribed by 42 U.S.C. § 9607(a)(4)(D), with post-judgment interest to accrue thereon until the amount owing is paid.

4. Plaintiffs/Counterdefendants are adjudged severally liable to Defendant/Counterclaimant Cyprus, by way of contribution pursuant to 42 U.S.C. § 9613(f), for seventy percent (70%) of the necessary costs of response, pursuant to 42 U.S.C. § 9607(a)(4)(B), which Defendant Cyprus has incurred and paid (and not previously sought from the Court), and shall pay in the future, to the United States, the State of Oklahoma, or any other party, in connection with the Off-Site Area at the Bartlesville Facility, excepting therefrom the costs paid under the February, 1994 Unilateral Administrative Order and the 1994 Consent Agreement and Final Order, as set forth in Finding of Fact No. 98, which costs are being shared by Salomon, Inc. and Cyprus on an agreed 50/50 basis.

5. Recognizing that industrial operations continue at the Bartlesville Facility at this time, and that additional industrial operations might occur at the Bartlesville Facility in the future, the 70/30 allocation in paragraphs 2 and 4 above applies to and includes only the contamination in the On-Site and Off-Site areas existing prior to and as of the date of this judgment that was caused by the operations previously conducted at the Bartlesville Facility.


6. The Court will retain jurisdiction over this matter in order to give effect to and enforce this judgment until such time as the Court concludes the purposes of this judgment have been carried out. Notwithstanding this retention of jurisdiction, this judgment represents a final decision of this Court for purposes of 28 U.S.C. § 1291. The parties are

expected to cooperate in their communications and timely share relevant information to achieve the ends and purposes expressed in the Amended Findings of Fact and Conclusions of Law and this Judgment.

7. The terms of the agreed protective order regarding confidential and privileged materials entered by the Court on April 3, 1995, shall remain in effect with respect to all information exchanged herein.

8. Each party to bear its own costs.

DATED this 31st day of May, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

FILED

MAY 30 1996

## United States District Court

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NORTHERN

DISTRICT OF

OKLAHOMA

ENTERED ON DOCKET

PHAEDRA WEBB, a minor, by &  
through her mother & next  
friend, SUSAN COHEN,  
v. Plaintiff,

DATE JUN - 4 1996

## JUDGMENT IN A CIVIL CASE

RAYMOND J. LOFFER, M.D.,

CASE NUMBER: 95-C-339-B

Defendant.


☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT RAYMOND J. LOFFER, M.D. AND AGAINST THE PLAINTIFF PHAEDRA WEBB.  
PARTIES SHALL BEAR THEIR OWN RESPECTIVE ATTORNEYS FEES.  
COSTS ARE AWARDED THE DEFENDANT AND AGAINST THE PLAINTIFF IF TIMELY APPLICATION IS FILED PURSUANT TO F.R.C.P. 54.1.

5-30-96

Date

  
THOMAS R. BRETT, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 3 1996 *JB*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

SAMUEL M. BROWN,

Plaintiff,

vs.

SHIRLEY E. CHATER, COMMISSIONER  
OF SOCIAL SECURITY,

Defendant.

Case No. 93-C-216-BU ✓

ENTERED ON DOCKET

DATE JUN 4 1996

**JUDGMENT**

Pursuant to the Court's Order, judgment is hereby entered in favor of Plaintiff, Samuel M. Brown, against Defendant, Shirley E. Chater, Commissioner of Social Security, and this action is remanded to Defendant for further administrative proceedings consistent with the Court's Order.

ENTERED this 3<sup>rd</sup> day of June, 1996.

*Michael Burrage*  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

**FILED**

**JUN 3 1996** *JB*

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SAMUEL M. BROWN,

Plaintiff,

vs.

SHIRLEY E. CHATER, Commissioner  
of Social Security,<sup>1</sup>

Defendant.

Case No. 93-C-216-BU ✓

**ENTERED ON DOCKET**

**DATE JUN 4 1996**

**ORDER**

This matter comes before the Court upon the appeal of Plaintiff, Samuel M. Brown, from judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying Plaintiff's application for disability insurance benefits under Sections 216(i) and 223, and Supplemental Security Income under Sections 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

Plaintiff filed an application for disability insurance benefits and supplemental security income benefits on April 8, 1991. Plaintiff alleged disability since January 1, 1990, due to low IQ, back pain, left knee pain and gastrointestinal problems. An Administrative Law Judge ("ALJ") held a hearing in regard to the application and subsequently denied the requested benefits on July

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<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Accordingly, Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as Defendant in this action. Although the Commissioner has been substituted in the caption, the Court will refer to the Secretary in its Order as she was the proper party at the time the briefs in this matter were submitted.

22, 1992. The Appeals Council denied his request for review on February 4, 1993. This decision became the final decision of the Secretary. Plaintiff thereafter filed his complaint for judicial review of the Secretary's decision pursuant to 42 U.S.C. § 405(g).

The Secretary has established a five-step sequential evaluation process for determining disability. 20 C.F.R. §§ 404.1520, 416.920 (1995). The five steps are:

1. Is the claimant presently engaged in substantial gainful activity?
2. If not, does the claimant have a severe impairment or combination of impairments?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security regulations. If so, the claimant is entitled to benefits.
4. If not, does the impairment prevent the claimant from performing work he has performed in the past?
5. Does the claimant's impairment prevent him from doing any other work in the national economy?

A claimant bears the burden of establishing a disability, i.e., the first four steps. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987); Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Services, 898 F.2d 774, 776 (10th Cir. 1990).

In the instant case, the ALJ found that Plaintiff had satisfied the first four steps. Therefore, the burden shifted to the Secretary to show that Plaintiff could perform other work in the national economy after considering his residual functional

capacity ("RFC"), age, education, and past work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f). Relying on testimony by a vocational expert, the ALJ found that Plaintiff could perform other jobs, namely, grounds keeper, janitorial work and assembly work. Based upon the vocational expert's testimony and using the medical-vocational guidelines Rules 203.25 or 203.26 as a framework for decision making, the ALJ accordingly found that Plaintiff was not disabled within the meaning of the Social Security Act.

Plaintiff complains that the Secretary made several errors regarding his application. Specifically, Plaintiff alleges:

- (1) That the ALJ failed to properly evaluate Plaintiff's subjective complaints;
- (2) That the ALJ failed to give substantial weight to treating sources;
- (3) That the ALJ erred in filling out a psychiatric review technique form;
- (4) That Plaintiff is uneducable, requires constant supervision and cannot perform jobs requiring constant bending;
- (5) That the ALJ failed to consider the combined effects of Plaintiff's impairments; and
- (6) That the ALJ did not pose a proper hypothetical question to the vocational expert.

This Court reviews the Secretary's decision to determine only whether his findings are supported by substantial evidence and whether the Secretary applied correct legal standards when making his decision. Turner v. Heckler, 754 F.2d 326, 328 (10th Cir. 1985). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion. Andrade v. Sec'y of Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A

decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988). The inquiry is not whether there was evidence which would have supported a different result, but whether there was substantial evidence in support of the result reached.

Plaintiff's first claimed error is that the ALJ did not properly evaluate his subjective complaints of pain. In Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), the Tenth Circuit outlined the framework in evaluating disability claim based upon pain:

If a pain-producing impairment is demonstrated by objective medical evidence, the decision maker must consider the relationship between the impairment and the pain alleged. "[T]he impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." . . . If an appropriate nexus does exist, the decision must then consider all the evidence presented to determine whether the claimant's pain is in fact disabling.

Id. at 163 (citation omitted). The first component of the inquiry, the objective impairment prerequisite, is fulfilled without regard to subjective evidence. The second component, a nexus between the impairment and the alleged pain, is examined "tak[ing] the subjective allegations of pain as true." Id. Upon reaching the third component, considering all evidence presented, the ALJ considers the medical data presented, any other objective indications of pain and subjective accounts of the severity of the pain. At this point, the ALJ may assess the claimant's credibility. Id.

The ALJ did not state whether the objective medical evidence established a pain-producing impairment or whether there was a loose nexus between that impairment and Plaintiff's subjective complaints of pain. However, there appears to be evidence that Plaintiff had impairments of the back and knee capable of causing pain and the impairments were reasonably expected to produce the pain being claimed by Plaintiff. Assuming that objective medical evidence showed that Plaintiff had back and knee problems producing pain, the ALJ was required to consider Plaintiff's assertions of pain and decide whether he believed them. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995). To do this, the ALJ was required to consider:

"the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence."

Id. (quoting Thompson v. Sullivan, 987 F.2d 1482, 1489 (10th Cir. 1993)).

In his decision, the ALJ listed some of these factors, levels of medication and their effectiveness and the nature of daily activities, but did not explain why the specific evidence relevant to those factors led him to conclude that Plaintiff's subjective complaints were not credible. There is evidence in the record which could be viewed as supporting claimant's contention. This evidence includes Plaintiff seeking medical treatment for his back

and knee pain; his physician's acknowledgement of the back and knee pain and noting that the back pain was chronic in nature; Plaintiff's taking of Tylenol #3 for his pain; and Plaintiff's daily activities being restricted.

The ALJ, in his decision, did state:

[t]he Administrative Law Judge notes that the claimant's knee problems were not severe in Exhibits 31 and 32. Subsequently, there has not been significant complaint. . . . Insofar as the claimant's back pain is concerned, there are sporadic references to it, but nothing indicating unremitting pain.

Record at 21. However, the Court concludes these findings are not supported by substantial evidence. The record reflects in Exhibit 33 that Plaintiff had significant complaints of back and knee pain. Plaintiff's attending and consultant physicians noted Plaintiff's back pain as chronic. It does not appear that the ALJ considered this medical evidence in making his credibility determination.

The Court recognizes credibility determinations are within the province of the finder of fact. Diaz, 898 F.2d at 777. However, "[f]indings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." Huston v. Bowen, 838 F.2d 1125, 1133 (10th Cir. 1988) (footnote omitted). The Court finds that the link between the evidence and credibility determination is missing. In the Court's view, there only exists the ALJ's conclusion in regard to Plaintiff's credibility.

The Court therefore finds that this matter should be remanded to the Secretary to make express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning


claimant's allegation of pain. Kepler, 68 F.3d at 391 (remanding for determination regarding a claimant's credibility).

The Court also concludes that this matter should be remanded for the Secretary to forth "specific, legitimate reasons" for disregarding his treating physician's opinion that Plaintiff is not employable because he does not have the "stamina, energy, attitude and presence to be able to maintain any type of employment." Substantial weight is afforded the opinions of a claimant's treating physician. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). While a conclusion of a treating physician does not direct a finding of "disabled" or "nondisabled," it cannot be disregarded absent "specific, legitimate reasons." Williams v. Bowen, 844 F.2d 748, 758 (10th Cir. 1988).

In light of this case being remanded to the Secretary, the Court declines to address the other errors raised by Plaintiff.

Based upon the foregoing, the Court **REMANDS** this matter to the Secretary for express findings in accordance with Luna, concerning Plaintiff's complaints of pain and for "specific, legitimate reasons" for disregarding the treating physician's opinion and for any further proceedings the Secretary finds necessary in light of those new findings.

ENTERED this 3 day of June, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

FILED

MAY 31 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

In the Matter of P.J.L., a  
Juvenile under 18 years of age,  
Andy McNorton,  
Petitioner,

vs.

The Seneca-Cayuga Tribe of  
Oklahoma and The Honorable  
Lynn Burris, Judge of The  
Court of Indian Offenses in  
and for Miami, Oklahoma,  
Respondents.

Case No. 96-CV-181-B ✓

ENTERED ON DOCKET  
JUN - 3 1996  
DATE

ORDER

The Court has for consideration Petitioner Andy McNorton's ("Petitioner") Petition for Writ of Habeas Corpus. (Docket # 1). After review of the extensive record before this Court, Petitioner's Writ of Habeas Corpus is hereby GRANTED. The Court FINDS the Newton County Circuit Court, Neosho, Missouri, has subject matter jurisdiction over the consolidated adoption/ juvenile action currently pending in the Newton County Circuit Court, Neosho, Missouri. The Respondent Judge Lynn Burris ("Judge Burris") is hereby ordered to issue a directive mandating the Seneca-Cayuga Tribe, through its representative, to safely return the minor P.J.L. to the custody of the Missouri Division of Family Services in Neosho, Missouri. It is the ORDER of this Court the minor P.J.L. is to be returned to the Missouri Division of Family Services under the jurisdiction of the Newton County Circuit Court of Neosho, Missouri, no later than 5:00 p.m.

05 MB  
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Wednesday, June 5, 1996. A representative of the Missouri Division of Family Services should likewise communicate with Judge Burris to achieve this end.

#### F A C T S

The stipulated facts of Petitioner and Respondent Judge Burris are attached as Court's Exhibit 1 and incorporated by reference herein.

In addition to the stipulated facts of Petitioner and Judge Burris, the Court FINDS on February 3, 1995, the natural mother, Tamatha Shinn ("Shinn") was exercising Court ordered visitation with PJJ in a Missouri Division of Family Services facility. On the strength of a rescinded Order of the Newton County Circuit Court, PJJ was taken by representatives of the Seneca-Cayuga Tribe, with the assistance of the Neosho Police Department, and transported to an unknown locale in Oklahoma. The Court finds there is evidence indicating it is probable the Seneca-Cayuga tribal representatives employing the revoked Order knew the Order had been revoked and, in all likelihood, perpetrated a fraud on the Newton County Circuit Court.<sup>1</sup> While it is impossible for this Court to alter the course of past events, all parties subject to this Court's jurisdiction are hereby advised this Court will not tolerate the wrongful interference with a state court's lawful exercise of jurisdiction. Due to the taking of

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<sup>1</sup>See Plaintiff's Ex. 1, pgs. 136-138.

PJL from the Missouri Division of Family Services facility, Petitioner has not had physical custody of PJL since February 3, 1995.

### A N A L Y S I S

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 1303. After thorough review of the rather convoluted and conflicting facts, previous court proceedings involving the minor PJL and applicable legal authorities, the Court is of the opinion a single issue exists: At any time prior to March 14, 1995, did the Newton County Circuit Court have jurisdiction over the juvenile proceeding filed therein on or about October 14, 1994, case number JU394-121J, and/or the adoption case filed therein on or about November 23, 1994, case number JU394-134A?<sup>2</sup> The Court answers this question in the affirmative.

Finding the Newton County Circuit Court has subject matter and in personam jurisdiction over the consolidated juvenile/adoption action involves the application of Missouri state jurisdictional law to the facts as they existed as of

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<sup>2</sup>March 14, 1995, is the date Jackie Handle, Seneca-Cayuga Indian Child Welfare worker, filed a Petition for Child in Need of Care in the Court of Indian Offenses, Miami, Oklahoma, even though Seneca-Cayuga records indicate Shinn and/or PJL did not become members of the Tribe until June 3, 1995.

November 23, 1994.<sup>3</sup> On November 23, 1994, Petitioner initiated adoption proceedings in the Newton County Circuit Court, Neosho, Missouri, case number JU394-134A. At the time the adoption proceeding began, Petitioner had physical custody of the minor PJL and this custody dated back 14 months to mid-September, 1993, with approval of the natural mother, Shinn. Shinn was an Oklahoma resident. Petitioner alleged the natural father had abandoned the minor PJL.

Pursuant to Mo. Ann. Stat. § 452.445(4) (Vernon 1996), Missouri was the home state of the minor PJL, as PJL had lived with Petitioner in Missouri for at least six consecutive months immediately preceding the filing of the adoption action. Thus, the Missouri state court had jurisdiction over the adoption proceedings pursuant to Mo. Ann. Stat. § 452.450.1(1)(a) (Vernon 1996). Newton County Circuit Court was the proper venue in which to bring adoption proceedings as Petitioner and the minor PJL were residents of Newton County.

The Court specifically declines to find whether PJL or Shinn were covered by the Indian Child Welfare Act ("ICWA") at the time

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<sup>3</sup>For purposes of jurisdictional analysis, the Court chooses to use the date the adoption action was filed by Petitioner in Newton County Circuit Court. It is clear as of this date the Court had personal jurisdiction over Petitioner, PJL, Shinn and the Seneca-Cayuga Tribe. Personal jurisdiction over Shinn was obtained on October 19, 1994, when she filed a Petition for Appointment of Guardian in the Newton County Circuit Court. Personal jurisdiction over the Seneca-Cayuga Tribe was obtained, at least, by October 19, 1994, when it filed an ex parte Application for Emergency Custody in the same Court.

Petitioner initiated the adoption proceeding, but the record seems to indicate the ICWA did not apply. Assuming, *arguendo*, the ICWA covered PJJ and/or Shinn as of November 23, 1994, case law makes it clear the ICWA does not divest state courts of their jurisdiction over children of Indian descent living off the reservation. Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587 (10th Cir. 1985). So whether PJJ and/or Shinn were members of the Seneca-Cayuga Tribe prior to the filing of the adoption proceeding or whether they became members of the Seneca-Cayuga Tribe subsequent to the same filing, the Newton County Circuit Court would not automatically be divested of its jurisdiction. Thus, the Court FINDS the Newton County Circuit Court had personal and subject matter jurisdiction over Petitioner, PJJ, Shinn, and the Seneca-Cayuga Tribe as of November 23, 1994.<sup>4</sup>

As counsel for Petitioner correctly points out, it is well settled law that once jurisdiction is successfully invoked, subsequent events are of no importance and cannot divest a Court

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<sup>4</sup>This finding is supported further by statements made during the February 14, 1995 proceedings in Ottawa County District Court. Specifically:

(1) Mr. Richard James, attorney for the Seneca-Cayuga Tribe, stated he had no objection to the resolution of certain allegations in a Missouri forum. (Government's Ex. 12, pg. 36, lines 10-12).

(2) Mr. Cary Selsor, attorney for Shinn, stated he had filed no objections to the Missouri jurisdiction. (Government's Ex. 12, pg. 92, lines 5-6).

(3) The Honorable Robert E. Reavis, II, Associate District Judge, Ottawa County, stated, "It's clear that Missouri's got jurisdiction in the case over the child as far as the custody issues go." (Government's Ex. 12, pg. 87, lines 4-6).

of its jurisdiction. United States Fidelity and Guaranty v. Millers Mutual Fire Insurance Company of Texas, 396 F.2d 569 (8th Cir. 1968) (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938)). Despite this Court's efforts to simplify the present matter, it is not surprising that confusion pervades this litigation due to events subsequent to the Newton County Circuit Court obtaining jurisdiction. Such events include satellite litigation spawned by various interested parties<sup>5</sup>, the incessant changing of positions by Shinn on relevant issues<sup>6</sup> and the Seneca-Cayuga Tribe approving Shinn's enrollment application which she testifies under oath she did not complete and file.

On February 28, 1995, the Newton County Circuit Court entered an Order dismissing the adoption/juvenile case. In doing so, the Court found the ICWA applied. Under Missouri procedural law, a judgment of a state court does not become final until the expiration of thirty (30) days after its entry. Missouri Supreme

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<sup>5</sup>The Court notes the exercise of temporary emergency jurisdiction over PJJ by Judge Reavis, Ottawa County, to be proper under the circumstances existing at the time, but exercising temporary emergency jurisdiction did not divest the Newton County Circuit Court of its jurisdiction.

<sup>6</sup>For instance, on February 2, 1995, Shinn filed a Voluntary Grant of Custodial Rights to the Seneca-Cayuga Tribe in the Ottawa County District Court, therein stating she and PJJ were enrolled members of the Seneca-Cayuga Tribe of Oklahoma. However, on June 20, 1995, Shinn testified under oath she was not then and had never been a member of the Seneca-Cayuga Tribe of Oklahoma, but the record establishes she and the minor PJJ were granted Seneca-Cayuga tribal membership on June 3, 1995.

Court Rule 81.05. The trial court retains control over its judgments during that thirty day period. Missouri Supreme Court Rule 78.01. A motion for new trial filed within that thirty day period tolls the time for calculating the finality of an Order until the motion is ruled upon. Missouri Supreme Court Rule 78.04. Petitioner filed a timely motion for new trial seeking relief from the Newton County Circuit Court's Order of February 28, 1995. The motion for new trial was sustained on April 18, 1995. On June 20, 1995, the Newton County Circuit Court entered an Order finding it had jurisdiction, finding Shinn and PJJ were not members of the Seneca-Cayuga Tribe and granting temporary custody to Petitioner. The Seneca-Cayuga Tribe was not present at the June 20, 1995, hearing despite receiving notice from the Clerk of the Circuit Court, Neosho, Missouri. That judgment has become final.

It is not the task of this Court to pass on the merits of the June 20, 1995 Order. The fact remains the Order is a final judgment entitled to full faith and credit. U.S.C.A. Const. art. 4 §1; 28 U.S.C.A. §1738. The recognized and respected sovereignty of the Seneca-Cayuga Tribe does not exempt it from the purview of 28 U.S.C.A. §1738. See Kiowa Tribe of Oklahoma, *supra*, 592. Missouri, like every other state, has procedures which allow for the appeal of final Orders. Missouri Supreme Court Rule 81 et seq. This Court in no way wishes to restrict

the access and/or rights of any party to available appellate procedures. Additionally, the Court does not specifically find any eligible party to be precluded by this Order from filing a Petition in the Newton County Circuit Court for a transfer of the proceedings should they so desire.<sup>7</sup> That is an issue beyond the scope of this Order.

Due to the circuitous course of the litigation to this point and the Court's strong desire to get this litigation back on track, the Court shall address another issue which may or may not be of import. Assuming, for purposes of this discussion, Shinn and/or PJI were covered by the ICWA prior to Petitioner filing his adoption action. Further assume, for purposes of this discussion, the document filed on October 14, 1994 by the Seneca-Cayuga Tribe was a Petition for the transfer of proceedings pursuant to 25 U.S.C.A. §1911(b). Under the most liberal reading of the aforementioned statute, this Court is unable to find the Newton County Circuit Court was required at that point to transfer the proceedings. In the first instance, the Newton County Circuit Court was certainly entitled to determine whether or not the ICWA even applied. Even if the Court found the ICWA did apply, it still does not mandate an automatic transfer as several events could prevent such a transfer, such as the Court finding good cause not to transfer the case or upon objection by

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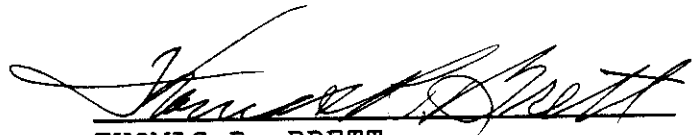
<sup>7</sup>It is clear from the record the Newton County Circuit Court throughout has been sensitive to its obligations under the ICWA.

either parent. This Court does not exceed the bounds of reasonableness by interpreting Shinn's June 20, 1995 testimony as an objection to the transfer of the proceedings and/or good cause for the Newton County Circuit Court not to transfer the proceedings. The purpose of this paragraph is not to disclose this Court's opinion on the merits of the Missouri litigation, but only to assuage the concern of any party(s) the Court overlooked this possibility.

In conclusion, this Court wishes to stress the importance of determining the best interests of PJL, whether it be in Newton County, Ottawa County, the CFR Court or this Court. The Court urges the parties to focus their collective energies on pursuing what is best for the minor PJL in a good faith manner.

The Court hereby GRANTS Petitioner's Writ of Habeas Corpus and directs Respondent Judge Burris to proceed pursuant to the guidelines established on page 1 herein.

IT IS SO ORDERED THIS 31<sup>st</sup> DAY OF MAY, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF PJL, A  
JUVENILE UNDER 18 YEARS OF  
AGE, ANDY McNORTON,

PETITIONER,

v.

THE SENECA-CAYUGA TRIBE OF  
OKLAHOMA AND THE  
HONORABLE LYNN BURRIS,  
JUDGE OF THE COURT OF INDIAN  
OFFENSES IN AND FOR MIAMI,  
OKLAHOMA,

RESPONDENTS.

) **FILED UNDER SEAL** **FILED**

MAY 24 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

) CASE NO. 96-CV-181B

STIPULATED FACTS OF ANDY McNORTON,  
PETITIONER, AND HONORABLE LYNN BURRIS, RESPONDENT

Comes now Andy McNorton, Petitioner, and Honorable Lynn Burris, Respondent,  
and for their stipulated facts submits as follows:

1. The Honorable Lynn Burris is a Judge of the Court of Indian Offenses located in Miami, Ottawa County, Oklahoma.
2. Service of Process was obtained upon Judge Lynn Burris through certified mail to Judge Lynn Burris, the United States Attorney for the Northern District of Oklahoma, and the United States Department of Justice, Office of Attorney General.

3. On September 11, 1991, Tamatha Ann Spencer was issued a Certificate of Degree of Indian Blood (CDIB) certifying that she is 5/64 degree Indian blood of the Seneca-Cayuga of Oklahoma Tribe.
4. On October 21, 1992, Patricia Jo Lasley ("PJL") was born to Jackie John Lasley and Tamatha Ann Lasley, aka Tamatha Ann Spencer, aka Tamatha Ann Shinn in Miami, Oklahoma.
5. On September 14, 1993, the natural mother, Tamatha Ann Spencer Lasley, gave Kathleen McNorton and Andy McNorton written permission to "take care of my minor child [PJL]."
6. From September 14, 1992, until February 3, 1994, the minor child lived with Andy McNorton at his residence in Seneca, Newton County, Missouri. From February 3, 1994, until the present, the minor child has been residing in foster care in Oklahoma.
7. On November 19, 1993, Tamatha Ann Lasley, the natural mother, signed a "Consent of Parent to Adoption" of PJL by Andy L. McNorton, which acknowledged that if the decree for adoption was granted, it would terminate her parental rights. The Consent was notarized. At the time the Consent was signed, no adoption proceeding had been filed concerning PJL.
8. Prior to any action being filed, the Seneca-Cayuga Tribe of Oklahoma filed an Entry of Appearance in the Juvenile Court of Newton County, Missouri, on October 14, 1994, pursuant to 25 U.S.C. § 1911(c), the Indian Child Welfare Act ("ICWA"), wherein the Tribe stated:

- A. "That the Seneca-Cayuga Indian Tribe of Oklahoma is a federally-recognized Indian Tribe eligible for the services provided Indians by the Secretary of the Interior because of their status as Indians";
  - B. "That the above named child [PJJ] is a direct descendant of a member of the Seneca-Cayuga Tribe of Oklahoma and is eligible for enrollment."
  - C. "That 25 U.S.C. 1911(c) gives an Indian child's tribe the absolute right to intervene at any point in a state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, so that it may exercise all rights conferred."
9. On October 19, 1994, an "Application for Emergency Custody" was filed in the Circuit Court of Newton County, Missouri, Case No. JU 394-121J, wherein Terry Kinder, the duly qualified Indian Child Welfare Director, stated that such application was necessitated because the minor child was "being illegally held by [a] non-Indian family (Andy and Cathy McNorton) in Seneca, Missouri." (Application of Emergency Custody, filed October 19, 1994).
10. On October 19, 1994, an "Order Placing Emergency Custody" was filed in the Circuit Court of Newton County, Missouri. The Order, signed by Judge T. W. Perigo, finds that "[t]he juvenile does fall within the purview of the Indian Child Welfare Act" and that "continuation of the child in this home [Andy L. McNorton] is contrary to the welfare of the child." The court placed temporary custody in the Seneca-Cayuga Tribe of Oklahoma, and physical custody in Tamatha and Jim Shinn.
11. No evidence of notice of the *ex parte* Emergency Order to the parties is found in the certified court file in Newton County, Missouri, Case No. JU 394-121J.

12. On October 19, 1994, Tamatha Shinn filed within the Circuit Court of Newton County, Missouri, a pleading entitled "Petition for Appointment of Guardian," wherein she represents that "she is the natural mother of [PJL]" and that "full custody of said minor child resides with her." Moreover, in that pleading, Tamatha Shinn "voluntarily request[s] that the court place legal custody and guardianship of [PJL] with the Seneca-Cayuga Tribe pursuant to the Indian Child Welfare Act (U.S.C. Section 25 USC 1912)."
13. On October 20, 1994, a docket entry in Case No. JU 394-121J, Newton County, Missouri, states that the emergency custody order was set aside. No evidence of notice to the parties is found in the certified court file. No evidence of appearances made by parties or attorneys before Judge T.W. Perigo is noted.
14. Tamatha Ann Shinn, through her counsel, filed an Application to Transfer Proceedings in the Court of Newton County, Missouri on November 7, 1994, stating, under oath:
  - A. "That the minor child, Patricia Jo Lasley, is an Indian Child as defined by the Indian Child Welfare Act U.S.C. 25 § 1903(4) in that she is eligible for membership in an Indian Tribe and is the biological child of a member of an Indian Tribe."
  - B. "That Patricia Jo Lasley is eligible for membership in the Seneca-Cayuga Tribe."(Application to Transfer)

15. In the Application to Transfer Proceedings, noted above, Tamatha Ann Shinn requested that "the Court enter its Order transferring this matter to the jurisdiction of the Seneca-Cayuga Tribe." (Application to Transfer)
16. Also on November 7, 1994, Tamatha Ann Shinn in Case No. JU 394-121J, Circuit Court of Newton County, Missouri filed, a "Withdrawal of Consent of Parent to Adoption," wherein she "withdraws her consent to the adoption of [PJL] by Andy L. McNorton pursuant to the Indian Child Welfare Act U.S.C. 25 § 1913(c)" and further requests that PJL be returned to her pursuant to 25 U.S.C. § 1913(c).
17. On November 23, 1994, McNorton initiated an adoption proceeding in the Circuit Court in Newton County, Missouri, Case No. JU 394-134A. McNorton attached a notarized "Consent of Parent to Adoption" executed by the natural mother on November 19, 1993. The Petition alleges that the natural father, Jacki John Lasley had willfully abandoned PJL and had continuously neglected to provide for the minor child for a period of at least six (6) months prior to the filing of the Petition for Adoption. McNorton requested that the father be served by publication because he was not a resident of Missouri and his address was unknown to McNorton. (Petition to Adopt)
18. No evidence of notification by publication to the father of the Petition for Adoption is found in the certified court file from Newton County, Missouri, Case No. JU 394-134A. The natural mother had withdrawn her consent to adopt in Newton County, Missouri, Case No. JU394-121J on November 7, 1994.

19. McNorton's Petition for Adoption was filed in Newton County, Missouri after the natural mother, Tamatha Shinn filed her "Withdrawal of Consent of Parent to Adoption" and her motion to transfer the proceedings to CFR court.
20. At a pretrial conference set on December 7, 1994, Case No. JU 394-121J was consolidated with the Adoption proceeding, under Case No. JU 394-134A. Notice was taken of the natural mother's motion to withdraw consent of adoption which was filed on November 7, 1994, in Case No. JU 394-121J. The court ordered supervised visitation of the mother with PJJ at the Newton County Office of the Missouri Division of Social Services. (Docket entry, Petition)
21. On December 8, 1994, the natural mother filed a Writ of Habeas Corpus in Newton County, Missouri, Case No. JU 394-136A. (Writ of Habeas Corpus)
22. On December 12, 1994, McNorton filed a "Section 1912 Notice," pursuant to ICWA, in Newton County, Missouri, notifying the natural mother and the Seneca-Cayuga Tribe that he had filed an Adoption proceeding on November 23, 1994, in Newton County, Missouri. (Section 1912 Notice)
23. On December 16, 1994, McNorton filed a "Motion to Quash Writ of Habeas Corpus" in Newton County Court. The court set a hearing date of January 31, 1995. (Motion to Quash)
24. On December 27, 1994, a letter was filed in Newton County, Missouri from Cathy Gorham, Children's Service Worker with Missouri Department of Social Services reflecting that a supervised visit between the biological mother and PJJ occurred

on December 23, 1994. Other visits were scheduled, pursuant to court order, on a weekly basis thereafter.

25. On January 25, 1995, mother's counsel requested a continuance of the hearing set for January 31, 1995 in Newton County, Missouri, Case No. JU394-134A. The request was granted on January 31, 1995.
26. On February 2, 1995, Tamatha Shinn, while living in Bluejacket, Oklahoma, filed a "Voluntary Grant of Custodial Rights" in the Ottawa County Court, Oklahoma, Case No. JFJ-95-37, which purported to grant her rights to care, custody and control of PJJ to the Seneca-Cayuga Tribe of Oklahoma. Tamatha Shinn stated that she and her minor daughter, PJJ, were enrolled members of the Seneca-Cayuga Tribe. She also stated that she understood that the grant of custodial rights was temporary and that she could have her child returned to her and the grant of custodial rights dissolved upon her application of the court. No reference to the Missouri legal proceedings was made to the Oklahoma Court. (Voluntary Grant of Custodial Rights)
27. On February 7, 1995, McNorton filed a Petition for Writ of Habeas Corpus in the District Court of Ottawa County, Oklahoma, whereupon an order to show cause was issued by the court. (Petition, Petition in Newton County)
28. On February 14, 1995, at the show cause hearing in Ottawa County, Oklahoma, the tribe presented evidence that there was a suspicion that the child had been sexually abused by McNorton. The Court thereupon issued an order for temporary emergency custody to retain limited jurisdiction over the child until

February 21, 1995, when the adoption matter was set for hearing in Newton County, Missouri. The child was to remain in Oklahoma under custody of Seneca-Cayuga Tribe. McNorton's Petition for Writ of Habeas Corpus was denied. (Petition)

29. There is no record that a Petition for protection of the child was filed in Ottawa County, Oklahoma.
30. On February 21, 1995, in Newton County, Missouri, the court heard testimony on Tamatha Shinn's motion to transfer the proceedings to the CFR court in Miami, Oklahoma pursuant to ICWA. The court continued the hearing until February 28, 1995, for additional evidence. (Petition)
31. Upon application, the Ottawa County Court, Oklahoma extended its emergency jurisdiction until February 28, 1995.
32. On February 28, 1995, in Newton County, Missouri, after hearing testimony by all parties, the court ruled that ICWA applied to the minor child, PJJ and dismissed the action. (Petition, docket sheet)
33. On March 14, 1995, a Petition for Child in Need of Care, in the Court of Indian Offenses ("CFR Court"), Miami, Ottawa County, Oklahoma, Case No. JFJ-95-06 was filed by Jackie Handle, Seneca-Cayuga Indian Child welfare worker. The petition stated that custody was placed with the Seneca-Cayuga Tribe pursuant to an order by the Circuit Court of Newton County, Missouri. The Petition requested that the matter be set for an adjudicatory hearing and that custody remain with the Seneca-Cayuga Tribe. (Petition)

34. On April 18, 1995, McNorton's motion for a new trial in Newton County, Missouri, Case No. JU 394-134A was sustained and the trial was set for June 6, 1995.
35. On June 3, 1995, the first Saturday of June, at the regularly scheduled annual meeting for the Seneca-Cayuga Tribe, the General Council voted to accept Tamatha Shinn and PJL for membership in the Seneca-Cayuga Tribe. The membership cards were issued on June 5, 1995.
36. On June 5, 1995, Tamatha Shinn filed a "Motion to Dismiss" in Newton County, Missouri, stating that she and PJL are enrolled members of the Seneca-Cayuga Tribe and that an open juvenile matter was pending in CFR court in Miami, Ottawa County, Oklahoma. Attached to her motion were a tribal certification that Tamatha Shinn was 5/64 enrolled member of the Seneca-Cayuga Tribe, and a membership card for PJL which showed that she as a 5/128 enrolled member of the Seneca-Cayuga Tribe.
37. On June 6, 1995, McNorton filed "Suggestions in Opposition to Mother's Motion to Dismiss" in Newton County, Oklahoma, Case No. JU 394-134A, arguing that jurisdiction vested at the time the action was begun and that subsequent events cannot divest the court of its established jurisdiction
38. On June 6, 1996, a minute order reflects that a hearing was held in Newton County, Missouri to hear the natural mother's motion to dismiss. The natural mother and McNorton and their respective attorneys appeared. The Tribe nor its representatives were present. The court took the matter under advisement until

June 20, 1995. Further, the court ordered the clerk to notify the Seneca-Cayuga Tribe of its right to intervene. (minute entry) A docket entry reflects that the Seneca-Cayuga Tribe was notified of the June 20, 1995, hearing.

39. On June 20, 1995, the Newton County, Missouri Circuit Court found that the child was not an Indian child, that ICWA did not apply, and that the Newton County Court had exclusive jurisdiction pursuant to UCCJA. The court further found that Tamatha Shinn was not a member of an Indian tribe, and that mother wanted her voluntary grant of custody filed in Ottawa County, Oklahoma, Case No. JFJ-95-37, rescinded. The court found that the mother denied applying for membership in the tribe and wanted to rescind her enrollment in the Seneca-Cayuga Tribe. The Newton County Court, Missouri, found that it had jurisdiction of the subject matter and persons. The court dismissed Tamatha Shinn's motion to dismiss. A contempt motion that had been filed against Tamatha Shinn was withdrawn. The Seneca-Cayuga Tribe was ordered to return PJJ to Newton County, Missouri. McNorton was granted temporary custody of PJJ.

40. On June 21, 1995, Tamatha Shinn filed a handwritten statement in Ottawa County, Oklahoma District court stating:

To the Seneca-Cayuga Tribe

I Tamatha Ann Spencer Shinn on this said date June, 21, 1995 do wish to decline my membership and enrollment of the Seneca-Cayuga tribe, and further more the membership & enrollment of my children, [LRS] and [PJJ] , also to be declined.

I wish that my child be returned to me upon my demand [sic] [LRS] at this time.

/s/ Tamatha Shinn

The document, prepared on June 21, 1995, was purportedly notarized on July 21, 1995.


41. On June 21, 1995, Tamatha Shinn filed a document in the District Court in Ottawa County, Oklahoma revoking the Voluntary Grant of Custodial Rights given to the Seneca-Cayuga Tribe on February 2, 1995, in the Ottawa County, Oklahoma District Court. She acknowledged that when she signed the voluntary grant of custody in February 2, 1995, an adoption proceeding involving PJJ was pending in Newton County, Missouri, and that at the time she signed the document, neither she nor her daughter, PJJ, were enrolled members of the Seneca-Cayuga Tribe of Oklahoma. She further acknowledged that the document granted temporary custody, and that she could dissolve the transfer and have the child returned to her upon her application to the Ottawa County Court. With this pleading, the natural mother revoked her voluntary consent to the transfer of custody and requested her return.
42. On June 22, an authenticated copy of the Newton County, Missouri Court Order of June 20, 1995, entered in Case No. JU394-134A was filed in CFR Court, Miami, Ottawa County, Oklahoma, Case No. JFJ 95-06, by McNorton.
43. On July 14, 1995, McNorton filed a Motion to Dismiss the proceedings in CFR Court, Miami, Ottawa County, Oklahoma, and a Motion to Intervene.
44. On July 18, 1995, the natural father, Jacki Lasley, filed a "Cross Petition for Termination of Parental Rights and for Placement of the Child for Adoption with Family Members" in CFR Court, Miami, Ottawa County, Oklahoma. He alleged

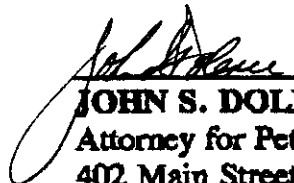
that he was not served notice in the Newton County, Missouri adoption proceedings. The natural father stipulated that the child is in need of care.

45. On July 24, 1995, McNorton, as an intervenor, filed an application for continuance in CFR Court, Miami, Ottawa County, Oklahoma in Case No. JFJ-95-06.
46. Through a series of informal requests for continuances and budgetary constraints (the shut down of the Federal Government), McNorton's motion to dismiss was not heard until February 8, 1996.
47. On August 14, 1995, McNorton filed a "Request for Setting" for the CFR court to consider the motions filed by him.
48. Notice of case settings in the CFR court were mailed to counsel for McNorton, Jackie Lasley, the natural father and Tamatha Shinn, the natural mother, by the CFR court clerk on December 1, 1995, December 13, 1995, and January 26, 1996.
49. On February 2, 1996, McNorton's attorney filed a notice with the CFR court that he had changed his address.
50. On February 8, 1996, the CFR Court in Miami, Ottawa County, Oklahoma, Case No. JFJ-95-06, heard arguments on McNorton's motion to dismiss. The court denied McNorton's motion to dismiss. The court adjudicated PJJ as a child in need of care. PJJ was made a ward of the court and legal custody was placed with the Seneca-Cayuga Tribe. The Order reflects that all parties stipulated that the child was in need of care.

51. No appeal was taken by McNorton from the CFR court order of February 8, 1996.
52. On March 8, 1996, McNorton filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma.
53. Further disposition of the juvenile matter in the CFR court has been stayed pending resolution of the action in this court.

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**CERTIFICATE OF MAILING**

I hereby certify that on the 24<sup>th</sup> day of May, 1996 a true and correct copy of the foregoing Notice of Filing Statement of Judge Lynn Burris, was mailed, postage prepaid thereon, to:

Mr. Jess Green, Esq.  
301 East Main  
Ada, OK 74820

Mr. John S. Dolence, Esq.  
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Honorable Lynn Burris  
Court of Indian Offenses  
P O Box 391  
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Sharon Blackwell, Esq.  
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CATHRYN McCLANAHAN  
Assistant United States Attorney

CM:rc

DATE 6-3-96

MANUEL MARQUEZ,  
Petitioner,  
vs.  
RON CHAMPION,  
Respondent.

**FILED**

MAY 31 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Payne County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

- (1) Petitioner's motion for leave to proceed in forma pauperis is **granted**; and
- (2) Petitioner's application for a writ of habeas corpus is **transferred** to the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

IT IS SO ORDERED this 30 day of May, 1996.

TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
JUN 03 1996  
DATE \_\_\_\_\_

DAVID L. HISHAW,  
Petitioner,  
vs.  
STEVE HARGETT,  
Respondent.

No. 95-C-905-K

FILED

MAY 31 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the Judgment and Sentence of Tulsa County District Court entered in Case Nos. CF-90-2836 and CF-91-3429. Respondent has submitted a Rule 5 response to which Petitioner has replied. Also before the Court are affidavits from Petitioner and his trial counsel. As more fully set out below, the Court concludes that this petition for a writ of habeas corpus should be conditionally granted.<sup>1</sup>

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<sup>1</sup> On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, H.R. Rep. No. 104-518, 104th Cong., 2d Sess., which provides new standards for analyzing a petition for a writ of habeas corpus. The Court does not believe that the new provisions set out in section 105 apply to petitions, like the one at hand, which were filed before the passage of the Act. Although Congress specifically mandated that the new procedures for habeas corpus petitions involving capital punishment are to apply to all pending and subsequently filed cases, Congress declined to include such language in section 105, and therefore the Court infers that retroactivity was not intended. In any event, even if the Court viewed the statute as lacking the clear intent favoring retroactive application, the Court believes section 105 would have a truly retroactive effect and therefore be subject to the "traditional presumption" against retroactive application of a statute." Landgraf v. USI Film Prods., 114 S.Ct. 1483, 1493-96 (1994). Therefore, the 1996 amendments to section 2254 do not apply to the instant case.

## I. BACKGROUND

On November 20, 1991, a Tulsa County jury found Petitioner guilty of leaving the scene of an accident involving a death, after former conviction of two or more felonies, and driving under suspension. On December 14, 1994, the trial court set punishment at 20 years on Count I and one year on Count II. Petitioner was represented by retained counsel, Fred M. Schraeder, at trial and at sentencing. Neither Petitioner nor Mr. Schraeder filed a notice of intent to appeal, although the trial judge had advised Petitioner of his right to an appeal.

In 1995, Petitioner, pro se, filed an application for post-conviction relief and contended he was denied an appeal through no fault of his own. Petitioner alleged "that his retained counsel told him he would not represent [him] on appeal because Petitioner could not pay his attorney's fee, but that he would get the public defender to represent Petitioner." In May 1995, the district court denied post-conviction relief on the following ground:

The court finds that, other than the self-serving statements of the petitioner, there is nothing to support petitioner's claim that petitioner was denied an appeal through no fault of his own. Clearly there are no facts present in petitioner's case which would invoke the holdings of Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991).

Therefore, the court finds that petitioner was advised of the right to appeal, yet, during the ten-day period following sentencing, petitioner made no attempts and gave no indication of wanting to contact counsel so as to discuss the possibility and/or perfect an appeal of petitioner's conviction. Nor does the record reflect any attempts by the petitioner to contact the court in an attempt to appeal petitioner's conviction.

(Ex. A at 2.) On July 31, 1995, the Court of Criminal Appeals affirmed.

Having exhausted his State court remedies, Petitioner filed the instant application for a writ of habeas corpus on September 12, 1995. Petitioner restates he was denied a direct appeal through no fault of his own. He contends as follows:

Later on the same date [as sentencing] retained counsel visited with Petitioner and advised him of three propositions for appeal and informed Petitioner that since Petitioner could not afford to pay for his service he would call the Indigent Defense System and have someone to come down and talk with Petitioner. Several days later retained counsel contacted Petitioner's father James D. Hishaw, and told him that if he could come up with \$600.00 by the 15th of December, 1994, he would start on Petitioner's appeal. Petitioner's father could not come up with the money so retained counsel lefted [sic] Petitioner without withdrawing from his case nor [p]reserving Petitioner's appeal [rights].

(Docket #1 at 5-6.)

Respondent contends Mr. Schraeder had no obligation to file a notice of appeal because Petitioner never expected his trial counsel to represent him and possibly never indicated that he desired to appeal. (Docket #6, at 6.) In his affidavit, Mr. Schraeder attests that Petitioner expressed an interest in appealing his conviction. He attests as follows:

4. After the trial, I advised David Hishaw of his appeal rights regarding the appeal of his verdict and sentencing.
5. I advised him of the procedure for perfecting an appeal, as well as the legal and factual basis for an appeal. I also advised him of the costs of the appeal including the fees necessary for filing, preparation of the trial transcript and other costs involved.
6. David Hishaw on, the date of sentencing, and at a meeting with me two (days) later expressed an interest in perfecting an appeal.
7. I subsequently learned, within 30 days of the filing of the Judgment and Sentencing [sic], that David Hishaw, either personally or through family members, had contacted another attorney regarding his appeal.
8. I have no knowledge of any conversation regarding an appeal with anyone other than myself but, from my one conversation with David Hishaw, I have no doubt that Mr.

Hishaw was aware of his appeal rights, the time limits for that appeal, the procedure and the costs involved.

9. In my opinion, David Hishaw did not exercise his appeal rights because of having intentionally let his appeal rights lapse by his failure to decide to affect an appeal in a timely manner.

(Docket #9.)

Petitioner counters will the following affidavit:

2. On December 5, 1994, the same day of sentencing in Case No. CRF-94-3067 Counts 1 and 2, retained counsel Fred M. Schraeder came to Tulsa County Jail, and advised me of my rights to appeal and errors which should be raised on direct appeal. At which time I informed counsel Fred M. Schraeder that I could not afford his service on direct appeal. Mr. Schraeder informed me that he would get in touch with the Public Defenders Office.

3. That I, David L. Hishaw, have never discussed retaining another Attorney to represent me on direct appeal. I could not afford to retained [sic] Fred Schraeder on direct appeal because I obtained no funds after jury trial.

4. In my opinion, Fred M. Schraeder, failed to provide his service required by the Rules of the Oklahoma Court of Criminal Appeals pursuant to Rule 1.14(D), and I never had control of my appeals rights under 22 O.S. §1051.

(Docket #10.)

## II. ANALYSIS

The only contention in this case is whether Petitioner was denied the effective assistance of counsel when his retained counsel failed to give notice and perfect an appeal during the ten-day period following the entry of the Judgment and Sentence. It is well established that a defendant's right to effective assistance of counsel applies at trial as well as during the ten-day period for perfecting a direct appeal. Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991); Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir.), cert. denied, 115 S.Ct. 2591 (1995). To establish

ineffective assistance of counsel for failure to properly perfect an appeal, Petitioner must only show that Mr. Schraeder's conduct fell below an objective standard of reasonableness. Romero, 46 F.3d at 1030 (citing Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that the district court erred in requiring the defendant to show prejudice); Hannon v. Maschner, 845 F.2d 1553, 1558 (10th Cir. 1988)). If Petitioner can prove that the ineffectiveness of counsel denied him the right to appeal, then this Court need not determine whether he would have had some chance of success on appeal; "prejudice is presumed." Romero, 46 F.3d at 1030 (cited case omitted).

In deciding an ineffectiveness claim, this Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. 668, 690 (1984). In Romero, the Tenth Circuit Court of Appeals restated counsel's responsibility to perfect an appeal following a jury trial.

[A] defendant does not need to express to counsel his intent to appeal for counsel to be constitutionally obligated to perfect the defendant's appeal. The Sixth Amendment's guarantee of effective counsel requires that counsel explain the advantages and disadvantages of an appeal, advise the defendant as to whether there are meritorious grounds for an appeal, and inquire whether the defendant wants to appeal his conviction. Counsel retains these obligations unless defendant executes a "voluntary, knowing, and intelligent" waiver of his right to counsel on appeal. And a defendant's failure to contact counsel "does not suggest that he knowingly and voluntarily waived his right to counsel." Because counsel in Baker "never advised [the defendant] of the pros and cons of appealing his conviction, and did not ascertain whether he wanted to appeal," his assistance was constitutionally ineffective.

Romero, 46 F.3d at 1031.

Respondent relies on the State district court's findings that Petitioner gave no indication that he desired to appeal his conviction during the ten-day period for perfecting an appeal. State court's findings of waiver are factual findings subject to a presumption of correctness under 28 U.S.C. § 2254(d). See Meeks v. Cabana, 845 F.2d 1319, 1323 (5th Cir. 1988); see also United States v. Gibson, 985 F.2d 212, 216 (5th Cir. 1993). Section 2254(d), however, requires a "hearing on the merits" in the State court on the disputed factual issue in order to raise this presumption of correctness in the federal proceeding. See Sumner v. Mata, 449 U.S. 539, 548-49 (1981). Findings based on a written record qualify as a "hearing on the merits" under section 2254(d). May v. Collins, 955 F.2d 299, 310-15 (5th Cir.), cert. denied, 504 U.S. 901 (1992); see also Sumner, 449 U.S. at 546-47 (appellate level fact finding, based as it was solely on the written record before the appellate court, qualified as a "hearing").

In the instant case, the State court's determination, adopted by the Court of Criminal Appeals, was not after a "hearing on the merits." The State court could not have made credibility determinations as it did not have affidavits from Petitioner and his attorney. See May, 955 F.2d at 313; Carter v. Collins, 918 F.2d 1198, 1202 (5th Cir. 1990). Therefore, the State court's findings are not entitled to a presumption of correctness and this Court can analyze the record before it *de novo*.

The affidavits filed by Petitioner and Mr. Schaefer in this

action indicate that Petitioner twice informed Mr. Schaefer of his desire to appeal his conviction, once immediately following sentencing and then two days later at a meeting with Mr. Schaefer at the Tulsa County Jail. In Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991), the Tenth Circuit Court of Appeals recognized that "[c]ounsel must . . . inquire whether the defendant wants to appeal his conviction; if that is the client's wish, counsel must perfect an appeal." Similarly, "[t]he general rule of law in Oklahoma is that the last act required of trial counsel is the filing of all jurisdictional documents required to be filed in the district court to perfect an appeal." Pueblo v. State, 799 P.2d 141, 141 (Okla.Crim.App. 1990); Rule 1.14(D).<sup>2</sup> "An appearance before [the Court of Criminal Appeals] for purposes of perfecting an appeal is not made until the filing of the Petition in Error, with supporting original record and transcript of evidence, as required by Rule 3.1 et seq. of the Rules of the Oklahoma Court of Criminal Appeals, 22 O.S.Supp. 1989, Ch. 18, App." Id.

Respondent contends the Tenth Circuit Court of Appeals has repeatedly determined that a notice of intent to appeal binds trial counsel on appeal, citing Abels v. Kaiser, 913 F.2d 821 (10th Cir.

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<sup>2</sup> Rule 1.14(D) of the Rules of the Court of Criminal Appeals provides as follows:

The trial attorney in all cases shall be responsible for completing and filing the Notice of Intent to Appeal and Designation of Record required by Rule 1.14(C). If a defendant does not direct the trial attorney to initiate an appeal, the attorney shall prepare and file the form set out in Section XIII, Form 13.5, stating the defendant has been fully advised of his/her appeal rights and does not want to appeal the conviction.

1990). Since Abels, however, the Tenth Circuit Court of Appeals has recognized

(1) that as a matter of state law, trial counsel, retained or appointed, has no duty to act for the defendant beyond filing a notice of intent to appeal; (2) that this is not in conflict with Oklahoma Rule 3.6A which requires an attorney who "makes an appearance" to proceed, including filing a brief, until relieved by an order of the court; and (3) that is not in conflict because until the attorney files a Petition in Error, with supporting original record and transcript of the evidence, he has not "appeared" in the appellate court.

Jones v. Cowley, 28 F.3d 1067, 1072 (10th Cir. 1994).

In the instant case, it is undisputed that trial counsel abandoned Petitioner before filing a notice of intent to appeal and designation of record as required by state law. Therefore, the Court finds Mr. Schaefer's failure to preserve Petitioner's right to a direct appeal fell below an objective standard of reasonableness and amounts to ineffective assistance of counsel in violation of the Sixth Amendment.

### III. CONCLUSION

Accordingly, this case is STAYED for ninety (90) days, from the date of filing of this order, to allow the Court of Criminal Appeals to grant Petitioner an appeal out of time and provide him with assistance of counsel. If the Court of Criminal Appeals grants an out-of-time appeal, the instant petition for a writ of habeas corpus will be dismissed. If the Court of Criminal Appeals fails to grant an out-of-time appeal and the assistance of counsel within the time set out in this order, the writ of habeas corpus shall issue. Respondent shall FILE a status report advising the

Court whether Petitioner has been granted an appeal out of time no later than ninety (90) days from the date of filing of this order.

SO ORDERED THIS 30 day of May, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
6-3-96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SAMSON RESOURCES COMPANY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
EL PASO NATURAL GAS COMPANY, )  
 )  
Defendant. )

No. 96-CV-51-H

**F I L E D**

**MAY 31 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), the Plaintiff hereby dismisses this action in its entirety and with prejudice to its refiling, the Defendant not previously having answered or moved for summary judgment.

Respectfully submitted,



R.K. Pezold, OBA No. 7100  
Joseph C. Woltz, OBA No. 14341  
Piper M. Willhite, OBA No. 16751  
PEZOLD, RICHEY, CARUSO & BARKER  
15 West 6th Street, Suite 2800  
Tulsa, Oklahoma 74119-5415  
(918) 584-0506

Attorneys for the Plaintiff

ENTERED ON DOCKET  
DATE 6-3-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 31 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ZELDA GOSSETT,

Plaintiff,

v.

HARSCO CORPORATION,

Defendant.

Case No. 95-C-793C

STIPULATION OF DISMISSAL WITH PREJUDICE

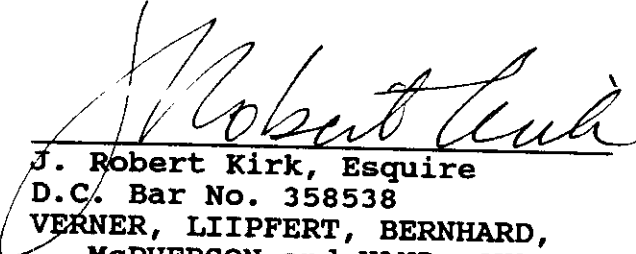
Pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), and with the consent of all parties by and through their undersigned counsel of record, Plaintiff Zelda Gossett hereby stipulates and agrees that all of the claims made on her behalf in the above-captioned action should be dismissed with prejudice, with each party to bear all of her or its own costs and fees.

Ralph Simon  
Ralph Simon, OBA #8254  
403 S. Cheyenne, Suite 1200  
Tulsa, Oklahoma 74103-3807

Attorney for Plaintiff Gossett

FELDMAN, HALL, FRANDEN,  
WOODARD & FARRIS

J. Duke Ingle for John R. Woodard  
John R. Woodard, FII, #9853  
Jody R. Nathan, #11685  
525 South Main, Suite 1400  
Tulsa, Oklahoma 74103-4409  
(918) 583-7129

  
J. Robert Kirk, Esquire  
D.C. Bar No. 358538  
VERNER, LIIPFERT, BERNHARD,  
McPHERSON and HAND, CHARTERED  
901 15th Street, N.W., Suite 700  
Washington, D.C. 20005  
(202) 371-6000

Attorneys for Defendant HARSCO

Dated: May 31, 1996

4

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Plaintiff,

vs.

VICKIE A. WILLIAMS, et al.,

Defendants.

ENTERED ON DOCKET

DATE JUN - 3 1996

No. 95-C-34-K ✓

**FILED**

MAY 31 1996

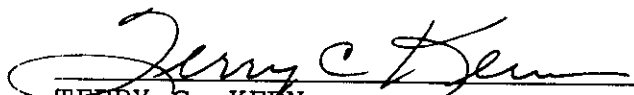
ADMINISTRATIVE CLOSING ORDER

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 30 day of May, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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7

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

PAUL SMITH,

Plaintiff,

vs.

DR. SATAYABAMA JOHNSON, and  
WEXFORD MEDICAL SERVICES,

Defendants.

ENTERED ON DOCKET

DATE **JUN - 3 1996**

No. 96-CV-31-K

**FILED**

MAY 31 1996

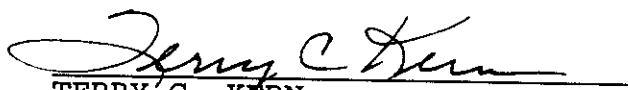
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

On May 6, 1996, The Court granted Plaintiff fifteen days to notify the Court of his new address, otherwise this action would be dismissed for lack of prosecution. Plaintiff has not responded.

Accordingly, this action is hereby DISMISSED for lack of prosecution.

IT IS SO ORDERED this 30 day of May, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

10

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DARRELL GENE BYROM; MICHELLE  
BYROM; COUNTY TREASURER, Tulsa  
County, Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

MAY 31 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JUN - 3 1996

Civil Case No. 95 C 1095B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31 day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, DARRELL GENE BYROM and MICHELLE BYROM, appear not, but make default.

The Court further finds that the Defendants, DARRELL GENE BYROM and MICHELLE BYROM, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning March 14, 1996, and continuing through April 18, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain

the whereabouts of the Defendants, DARRELL GENE BYROM and MICHELLE BYROM, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, DARRELL GENE BYROM and MICHELLE BYROM. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on November 16, 1995; and that the Defendants, DARRELL GENE BYROM and MICHELLE BYROM, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, DARRELL GENE BYROM and MICHELLE BYROM, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Sixteen (16), Block Fourteen (14),  
CARBONDALE, Tulsa County, State of Oklahoma,  
according to the recorded Plat thereof.**

The Court further finds that on April 30, 1987, the Defendant, DARRELL GENE BYROM, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, his mortgage note in the amount of \$47,322.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, DARRELL GENE BYROM, a single person, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, a mortgage dated April 30, 1987, covering the above-described property. Said mortgage was recorded on May 6, 1987, in Book 5021, Page 1363, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 30, 1987, FIRST SECURITY MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to BANK OF OKLAHOMA, N.A. This Assignment of Mortgage was recorded on July 19, 1989, in Book 5195, Page 1944, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 14, 1989, BANK OF OKLAHOMA, N.A., assigned the above-described mortgage note and mortgage to THE SECRETARY OF

HOUSING AND URBAN DEVELOPMENT OF WASHINGTON D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 19, 1989, in Book 5208, Page 868, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1989, the Defendant, DARRELL GENE BYROM, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, DARRELL GENE BYROM, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DARRELL GENE BYROM, is indebted to the Plaintiff in the principal sum of \$70,414.43, plus interest at the rate of 9 percent per annum from March 22, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$463.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$26.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of \$26.00 which became a lien on the property

as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DARRELL GENE BYROM and MICHELLE BYROM, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, DARRELL GENE BYROM, in the principal sum of \$70,414.43, plus interest at the rate of 9 percent per annum from March 22, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$463.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$52.00, plus costs and interest, for personal property taxes for the years 1992 and 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, DARRELL GENE BYROM, MICHELLE BYROM and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, DARRELL GENE BYROM, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$463.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

**Third:**

In payment of the judgment rendered herein in favor of  
the Plaintiff;

**Fourth:**

In payment of Defendant, COUNTY TREASURER,  
Tulsa County, Oklahoma, in the amount of \$52.00,  
personal property taxes which are currently due and  
owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await  
further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant  
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right  
to possession based upon any right of redemption) in the mortgagor or any other person  
subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and  
after the sale of the above-described real property, under and by virtue of this judgment and  
decree, all of the Defendants and all persons claiming under them since the filing of the  
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim  
in or to the subject real property or any part thereof.

**S/ THOMAS R. BRETT**

**UNITED STATES DISTRICT JUDGE**

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #1158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463



**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4842  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 95 C 1095B

LFR:flv